Jurisdictional Statement

81-611

OFFICE
FILED
SEP 28 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

No. .

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Jurisdictional Statement.

JAMES F. MCHUGH
ROBERT HAYDOCK, JR.
MARC A. REARDON
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Whether the First, Sixth and Fourteenth Amendments to the Constitution of the United States render Massachusetts General Laws c. 278, § 16A void as construed by the Supreme Judicial Court to require exclusion of the press and the public from portions of all trials of certain crimes even over the opposition of the defendant and even in the absence of a request by the prosecution or the victim for such exclusion.

Table of Contents.

Opinions below 2

Jurisdiction 2

Statute involved 3

Statement of the case 3

Raising the federal question 9

I. Massachusetts General Laws c. 278, § 16A as construed by the Supreme Judicial Court violates the First Amendment to the Constitution of the United States as applied to the states through the Fourteenth Amendment 12

A. The First Amendment right to attend criminal trials requires that such trials be open in their entirety unless closure, in whole or in part, represents the least drastic means for achieving an overriding governmental interest 12

B. The interests identified by the Supreme Judicial Court are insufficient to require closure of all testimony of all victims at all trials comprehended by Massachusetts General Laws c. 278, § 16A 14

C. In order to ensure that an order closing a criminal trial, in whole or in part, is the least drastic means for achieving an overriding governmental interest, a hearing prior to closure is necessary 24

II. Massachusetts General Laws c. 278, § 16A violates appellant's rights under the Sixth Amendment to the Constitution of the United States 27

Conclusion 31

Appendix

Petition for extraordinary relief pursuant to Massachusetts General Laws chapter 211, section 3 1a

Exhibit A — motion to revoke orders concerning exclusion of the press 5a
Exhibit B — motion for hearing 6a
Exhibit C — motion to intervene 7a
Exhibit D — transcript of hearing on motions 8a
Order 22a
Judgment 23a
Opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts in Globe I 25a
Remand order of the Supreme Court 54a
Opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts in Globe II 57a
Notices of appeal to the Supreme Court of the United States 75a

Table of Authorities Cited.

CASES.

Ashland Publishing Co. v. Asbury, 612 S.W.2d 749 (Ky. App. 1980) 25
Barrows v. Jackson, 346 U.S. 249 (1953) 29
Branzburg v. Hayes, 408 U.S. 665 (1972) 13
Brown v. Board of Education, 347 U.S. 483 (1954) 15
Butler v. Michigan, 352 U.S. 380 (1957) 16n, 21
Carey v. Population Services International, 431 U.S. 678 (1977) 29
Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968) 26

Commonwealth v. Aladjem, Norfolk Superior Court Criminal No. 73102-9 3, 6

Commonwealth v. Joyce, Mass. Adv. Sh. (1981) 39, N.E.2d 21

Commonwealth v. Marshall, 356 Mass. 432, 253 N.E.2d 333 (1969) 19

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 22

Davis v. Alaska, 415 U.S. 308 (1974) 21

Detroit Free Press v. Recorder's Court Judge, 409 Mich. 364, 294 N.W.2d 827 (1980) 25

Douglas v. State, 328 So.2d 18 (Fla.), cert. denied, 429 U.S. 871 (1976) 16n

Eisenstadt v. Baird, 405 U.S. 438 (1972) 29

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 14, 19, 23

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 20, 25

Gannett Co. v. DePasquale, 443 U.S. 368 (1979) 13, 15, 16n, 24, 27 et seq.

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 17

Gilmore v. Utah, 429 U.S. 1012 (1976) 29n

Globe Newspaper Co. v. Superior Court, Mass. Adv. Sh. (1980) 485, 401 N.E.2d 360, 101 S.Ct. 259 (1980), Mass. Adv. Sh. (1981) 1493, N.E.2d 6, 7, 11n, 14, 16 et seq.

Gooding v. Wilson, 405 U.S. 518 (1972) 14

Griswold v. Connecticut, 381 U.S. 479 (1965) 18, 29

Herald Ass'n, Inc. v. Ellison, 138 Vt. 529, 419 A.2d 323 (1980) 25

In re Oliver, 333 U.S. 257 (1948) 23

In re United States ex rel. Pulitzer Publishing Co., 635 F.2d 676 (8th Cir. 1980) 25

In re Winship, 397 U.S. 358 (1970) 21

Lexington Herald Leader Co. v. Tackett, 601 S.W.2d 905 (Ky. 1980) 19

Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977) 14, 19

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 15

Miller v. California, 413 U.S. 15 (1973) 18n

NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964) 14, 24

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 14

NAACP v. Button, 371 U.S. 415 (1963) 14

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 30

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 11

Oklahoma Publishing Co. v. District Court of Oklahoma County, 430 U.S. 308 (1977) 30

Patuxent Publishing Corp. v. State, 48 Md. App. 689, 429 A.2d 554 (1981) 25

Price v. State, 496 S.W.2d 103 (Tex. Crim. App. 1973) 16n

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 6, 7, 8, 9, 10 et seq.

Schaumburg v. Citizens for Better Environ., 444 U.S. 620 (1980) 14

Shelton v. Tucker, 364 U.S. 479 (1960) 14, 24

Singleton v. Wulff, 428 U.S. 106 (1976) 29, 30

Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) 22, 30

Speiser v. Randall, 357 U.S. 513 (1958) 11

Stanley v. Georgia, 394 U.S. 557 (1969) 18
State v. Green, 395 So.2d 532 (Fla. 1981) 25
State v. Schmit, 273 Minn. 78, 139 N.W.2d 800 (1966) 19
State v. Sheppard, 42 C.L.J. 23 (Conn. 1980) 19, 25
State v. Sinclair, 274 S.E.2d 411 (S.C. 1981) 25
State v. Wahle, 298 N.W.2d 795 (S.D. 1980) 25
Thornhill v. Alabama, 310 U.S. 88 (1940) 17
Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) 23
United States v. Edwards, A.2d , Nos. 294 and 401 (D.C. May 8, 1981) 25
United States ex rel. Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), cert. denied, 434 U.S. 1076 (1978) 16n

CONSTITUTIONAL PROVISIONS.

United States Constitution
Bill of Rights 30
First Amendment passim
Sixth Amendment passim
Fourteenth Amendment passim

STATUTES.

Alabama Code § 12-21-202 (1975) 17n
Massachusetts General Laws
c. 210
§ 5C 21n
§ 6 21n
§ 7 21n
§ 8 21n

c. 211, § 3 4
c. 220, § 13A 16n
c. 278, § 16A passim
New York Jud. Law § 4 (McKinney 1975) 17n
North Carolina Gen. Stat. § 15-166 (1975) 17n
Vermont Stat., tit. 12, § 1901 16n
Virginia Code § 19.2-266 12

MISCELLANEOUS.

Bickel, The Least Dangerous Branch, 108 (Bobbs-Merrill, 1962) 15
Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844 (1970) 14
Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect," 58 B.U. L. Rev. 685 (1978) 11

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

No. .

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE COUNTY
OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Jurisdictional Statement.

Globe Newspaper Company appeals from the final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts dated June 30, 1981. In the opinion accompanying that judgment, the Supreme Judicial Court, pursuant to the order of this Court entered October 14, 1980, reconsidered an opinion it had rendered in this case on February 24, 1980, and concluded again that Massachusetts General Laws c. 278, § 16A requires exclusion of the press and the public from portions of all trials of certain crimes.

Opinions Below.

The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts from which this appeal is taken appears in the appendix hereto, pages 57a-74a, *infra*, and is reported at Mass. Adv. Sh. (1981) 1493, N.E.2d . The Supreme Judicial Court's original opinion appears in the appendix hereto, pages 25a-53a, *infra*, and is reported at Mass. Adv. Sh. (1980) 485, 401 N.E.2d 360.

The order of this Court vacating the original judgment of the Supreme Judicial Court and remanding the case for further consideration appears in the appendix hereto, pages 54a-56a, *infra*, and is reported at 101 S.Ct. 259 (Oct. 14, 1980).

The decisions of the single justice of the Supreme Judicial Court for the County of Suffolk and of the trial judge of the Superior Court for the County of Norfolk were oral and unreported. Copies of portions of the transcripts of the hearings held before said courts at which the oral decisions were announced are included in the appendix hereto, pages 8a-11a and 12a-21a, *infra*.

Jurisdiction.

This is an appeal from a final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts entered June 30, 1981. In its decision, the court held that M.G.L. c. 278, § 16A requires a trial judge to exclude the press and public from the trial of certain crimes when the minor victims of those crimes are testifying.

A notice of appeal to this Court from that judgment was timely filed with the clerks of the Superior Court for the County of Norfolk, the Supreme Judicial Court for the County of Suffolk, and the Supreme Judicial Court for the Commonwealth of Massachusetts on September 22, 1981 (App. 75a-80a). This appeal is being docketed in this Court within 90 days from June 30, 1981, the date of entry of the final judgment of the Supreme Judicial Court.

Statute Involved.

The text of M.G.L. c. 278, § 16A is as follows:

> At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

Statement of the Case.

On or about April 19, 1979, the Superior Court for the County of Norfolk, Massachusetts commenced hearings with respect to pretrial motions in a criminal case styled *Commonwealth* v. *Aladjem*, Norfolk Superior Court Criminal No. 73102-9. At that time, the trial judge caused a sign reading "Closed" to be placed on the courtroom door. All persons approaching the courtroom doors were told by courtroom personnel that they could not enter (App. 27a).

On April 25, 1979, prior to commencement of that day's proceedings and the trial itself, counsel to Globe Newspaper Company (the "*Globe*") filed with the clerk three motions: (1) a motion to revoke orders concerning exclusion of the press from pretrial[1] or trial proceedings in the case (App. 5a); (2) a motion for a hearing with respect to any orders excluding the press from pretrial or trial proceedings (App. 6a); and (3) a motion to intervene for the limited purpose of asserting the right of the press to attend the pretrial and trial proceedings (App. 7a).

---

[1] This appeal is limited to the order entered by the trial court on April 25, 1979, which excluded the public and the press from the trial itself. No pretrial issues are presented.

The trial judge opened the proceedings that day by identifying the three motions filed by the *Globe*. Then, immediately after the prosecutor stated the age and sex of the victims and the fact that rape was the crime involved, the trial judge orally issued the following two rulings:

> This Court rules that the Motion to Intervene may not be filed. . . . This Court further rules that, consistent with General Laws Chapter 278 Section 16A, this trial will be conducted in such a manner that the general public shall be excluded from the courtroom, including the press, and that only such persons as may have a direct interest in the case will be permitted in the courtroom. [App. 10a].

At that point, counsel to Mr. Aladjem, the defendant in the case, noted his exception to the court's ruling excluding the general public and the press (App. 11a). The prosecutor then stated that the Commonwealth had not requested the exclusionary order (App. 11a). Thereafter, the trial judge said that the pretrial proceeding scheduled for that day would continue and that the courtroom should be cleared (App. 11a).

On April 25, 1979, the day that the closure order was entered, the *Globe* filed a petition for extraordinary relief pursuant to M.G.L. c. 211, § 3,[2] in the Supreme Judicial Court for

---

[2] Filing such a petition constitutes commencement of a new, and not an appellate, proceeding over which the Supreme Judicial Court has exclusive original jurisdiction. Massachusetts General Laws c. 211, § 3 provides:

> The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.
>
> In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section three C; and it may issue such writs, summonses and other processes and such orders, directions and rules as

the County of Suffolk, contesting the legality and constitutionality of the closure order entered pursuant to M.G.L. c. 278, § 16A by the trial court and the procedure pursuant to which the trial court had entered that order. The immediate relief sought by the petition was an injunction which, in effect, would have reversed the closure order and permitted members of the press to attend the criminal trial then about to commence (App. 1a-4a).

A hearing on the petition was held before a single justice of the Supreme Judicial Court for the County of Suffolk on the following day, April 26, 1979. At the hearing, the district attorney responsible for prosecuting the criminal case represented to the single justice that the prosecuting attorney had discussed the closure order with the victims and that, on behalf of the victims, the district attorney was waiving whatever rights the Commonwealth might have had under § 16A to seek to exclude the press from the trial (App. 15a-16a).

The single justice, while observing that the procedures utilized by the *Globe* in the trial court "adequately raised the question whether the Globe has any right to have the trial public" (App. 14a), denied the petition. He ruled orally that M.G.L. c. 278, § 16A was "mandatory in its terms" (App. 19a), and that even if not "utterly mandatory" (App. 19a), there had been no showing that the trial court had abused its discretion in closing the trial. He then ruled that the *Globe* had no First-Amendment right to attend the trial and had no standing to raise any Sixth-Amendment contentions (App. 20a-21a). A written order denying the *Globe's* petition was entered later the same day (App. 22a),[3] and final

---

may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

[3] The record contains the transcript of a brief lobby conference which took place on April 30, 1979, four days later. At the conference, attended by counsel for the parties to the criminal trial and the trial judge, the prosecut-

judgment dismissing the petition was entered eleven days later on May 7, 1979 (App. 23a).

Following entry of the single justice's order of April 26, 1979 denying the petition, impanelment of the jury in the underlying criminal action, *Commonwealth* v. *Aladjem*, began and that case was tried. On May 10, 1979, Mr. Aladjem was found not guilty (App. 28a). The trial was closed to the press and public throughout its course (App. 25a).

On May 17, 1979, the *Globe* filed its notice of appeal to the Supreme Judicial Court for the Commonwealth of Massachusetts from the May 7 judgment dismissing its petition. On February 26, 1980, the Supreme Judicial Court rendered its judgment. *Globe Newspaper Co.* v. *Superior Court*, Mass. Adv. Sh. (1980) 485, 401 N.E.2d 360 (hereinafter referred to as "*Globe I*").

In its opinion, the Supreme Judicial Court held that the issues raised before the single justice were moot, but that they were "significant and troublesome, and . . . 'capable of repetition yet evading review'" (App. 26a). Thus, while dismissing the *Globe*'s appeal on grounds of mootness, the Supreme Judicial Court deemed it appropriate to express its views on the issues the appeal raised (App. 26a).

The court did not, however, address the constitutional claims raised by the *Globe*. Although it acknowledged that such issues had been raised, it decided to await this Court's decision in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), for their resolution. Proceeding solely on the basis of statutory construction, the court ruled that § 16A *required* exclusion of the press and public from trials of certain crimes while the minor victims of these crimes were testifying

---

ing attorney said that she had spoken to the victims again and that they had told her that they had no objection to the presence of the press at the trial if the press would agree not to print their names, their photographs, where they went to school or other personal data about them. No action was taken with respect to the prosecuting attorney's comments, no examination of the victims with respect to their views thereafter was undertaken by anyone, and the trial proceeded in accordance with the trial court's earlier order of closure. As will be seen, the concerns voiced by the victims on April 30 were concerns with which § 16A was not equipped to deal.

(App. 42a). It also ruled that the statute granted to the trial court discretion to exclude the press and the public from the entire trial of such crimes if exclusion was "necessary . . . to preserve evidence required for a just conviction" (App. 44a).

On May 4, 1980, the *Globe* filed a notice of appeal to this Court from the judgment of the Supreme Judicial Court just described. Within two months thereafter, this Court rendered its opinion in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), holding that the First Amendment to the Constitution of the United States guarantees the right of the public to attend criminal trials. Three months later, on October 14, 1980, this Court entered an order vacating the Supreme Judicial Court's judgment of February 26, 1980 and remanding the case for further consideration in light of *Richmond Newspapers*. 101 S.Ct. 259 (1980) (App. 54a).

The judgment of the Supreme Judicial Court on remand was entered on June 30, 1981. *Globe Newspaper Co.* v. *Superior Court*, Mass. Adv. Sh. (1981) 1493, N.E.2d (hereinafter referred to as "*Globe II*"). In light of this Court's remand order and the considerations regarding mootness expressed in *Globe I*, the Supreme Judicial Court held that the case was not moot as to First-Amendment issues raised by the *Globe*, thus reversing the conclusion it had reached in *Globe I* (App. 61a n.5). It also held, however, that this Court's remand order did not require consideration of the claim raised by the *Globe* under the Sixth Amendment. As a result, the court simply reiterated the conclusion expressed in *Globe I*, that the *Globe* had no standing to assert any such claim (App. 61a n.5).

The court then held that § 16A in its mandatory aspect did not violate the *Globe*'s First-Amendment rights as those rights were articulated by this Court in *Richmond Newspapers* (App. 72a). The court's decision was based in large part on what it said were the state interests underlying a "notable exception" to the unbroken historical tradition of openness of criminal trials. That exception, in the court's view, concerned cases involving sexual assaults, particularly those involving minor victims. The relevant state interests were those identified in *Globe I*, *i.e.*, sparing minor victims the embarrassment

of public testimony and promoting the "sound and orderly administration of justice" by encouraging minor victims of sexual assaults to come forward and give credible testimony (App. 68a). The court also held that, even though § 16A might appear designed to protect the minor victims of certain assaults, a minor victim who desired to testify in open court could not "waive" the statute's provisions, and thus that a trial the statute governed must proceed behind closed doors while the victim was testifying even if the victim objected (App. 69a n.15). Because the statute said nothing about public release of transcripts of the victim's testimony, however, the court left that to the "sound discretion of the trial judge" exercised in accordance with *Globe I*, *Globe II* and *Richmond Newspapers* (App. 68a n.14).

With respect to closure of portions of trials other than those during which minor victims were testifying, the court revised the standard announced in *Globe I* for determining whether closure was appropriate. Stating that after *Richmond Newspapers*, a trial judge was "obliged to recognize the constitutional right of the press and public to attend trials," the court held simply that the justification for any such closure "must comply with the standards of *Richmond Newspapers*" (App. 72a). The court specifically declined to articulate further the standard for discretionary closure to be applied by the trial judge under § 16A (App. 72a).[4]

Justice Wilkins, one of the five members of the panel which heard the case on remand, concurred specially for the purpose of stating his doubts that, in its mandatory aspect, § 16A was constitutional. Observing that the applicability of imputed legislative findings supporting § 16A was not assured in each case, and using the example of the minor victim who wanted the public to know precisely what a heinous crime the defendant had committed, Justice Wilkins would have construed § 16A as entirely permissive and would have required specific findings before closure, in whole or in part, was ordered in any case (App. 74a).

---

[4] The reluctance of the court to articulate standards to inform the trial court's exercise of discretion with respect to closure was perhaps based on its professed inability to find in *Richmond Newspapers* a constitutionally required standard for permissible closure which commanded majority support. *See* App. 62a n.8.

Raising the Federal Question.

At the earliest possible stage in the relevant proceedings, the *Globe* raised the claim that M.G.L. c. 278, § 16A violated the First and Sixth Amendments to the Constitution of the United States. In the petition filed by the *Globe* with the Supreme Judicial Court for Suffolk County on the day of the trial court's closure order — the petition which commenced the action on which this appeal is based — the *Globe* asserted that the order excluding the press from the trial was in "violation of the First Amendment to the Constitution of the United States" (App. 3a, ¶ 9), and "in violation of the Sixth Amendment to the Constitution" (App. 3a, ¶ 10). At the hearing before the single justice the following day, the *Globe* argued that the statute itself, if construed to require exclusion from the trial, violated both the First and Sixth Amendments (App. 14a).

The same federal constitutional claims were reiterated by the *Globe* before the Supreme Judicial Court for the Commonwealth during the proceedings leading up to that court's decisions in both *Globe I* and *Globe II* and in its prior appeal to this Court. In both *Globe I* and *Globe II*, the Supreme Judicial Court, by requiring the exclusion of the press and public from portions of certain criminal trials, denied the *Globe*'s federal constitutional claims. In *Globe I*, the *Globe*'s claims were effectively denied by the court's failure to reach the federal constitutional questions. In *Globe II*, the *Globe*'s federal constitutional claims were denied expressly on the basis of the court's interpretation of *Richmond Newspapers*. It is review of that denial which is here sought.

The Question is Substantial.

The question presented by this appeal requires the attention of this Court in order to ensure that rights guaranteed by the First, Sixth and Fourteenth Amendments to the Constitution are not compromised by failure to comply with the principles of law this Court announced in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). Moreover, the issue which this

appeal presents is novel and has not been squarely presented to this Court before. The Virginia statute involved in *Richmond Newspapers* provided the trial judge with discretion to determine whether a trial should be closed. There was no mandatory provision in the statute and, in fact, its very language recognized the countervailing interest in public trials. The Massachusetts statute at issue here, as construed by the Supreme Judicial Court, does contain a mandatory provision, a provision which absolutely forecloses any consideration by the trial court of the rights of the press and the public, the defendant or the minor victim in the context of a particular factual situation presented. It even requires closure in the face of opposition to closure by the victim, the presumed beneficiary of the statute's design. In both of these respects, the statute appears to stand alone amidst the plethora of discretionary state statutes dealing with the same subject.[5]

Beyond that, since this Court's decision in *Richmond Newspapers*, trial-closure orders have been reviewed by numerous state and federal appellate courts in light of the standards set forth in *Richmond Newspapers*. With the exception of the Supreme Judicial Court, those courts have reached the unanimous conclusion that *Richmond Newspapers* mandates a precise inquiry, on a case-by-case basis, into the existence and intensity of interests underlying a closure request as well as a canvass of alternatives less burdensome on First-Amendment rights than closure itself.[6] A number of those decisions have voiced that conclusion in the context of trials of crimes involving sexual assaults on, or physical abuse of, minors. The interpretation of M.G.L. c. 278, § 16A in *Globe II*, which *requires* the trial judge to close portions of certain trials, does not permit that precise and focused inquiry and never permits exploration or utilization of less burdensome alternatives which may in fact exist.

Finally, the expressed uncertainty of the Supreme Judicial Court as to the "binding rule of law" established in *Richmond*

---

[5] *See* discussion at p. 16, *infra*.

[6] *See* cases cited at p. 25, *infra*.

Newspapers (App. 62a n.8) enhances the substantial nature of the federal question presented here.[7] By its own analysis, the court's conclusions required it to give this Court's opinion in *Richmond Newspapers* a "close reading" (App. 61a). The court also found "some difficulty in determining the binding rule of law in a decision which lacks reasoning to which a majority of the Court has agreed" (App. 62a n.8). In his concurring opinion, Justice Wilkins expressed the view that the Supreme Judicial Court had "no guidance yet on whether the mandatory closing of all criminal trials during the testimony of minor victims of sex crimes is permissible under the First Amendment" (App. 73a). The degree of uncertainty expressed by the Supreme Judicial Court, however warranted, *see Richmond Newspapers* at 603 (Blackmun, J., concurring), is troublesome precisely because it is uncertainty over the parameters of an important constitutional right. To the extent that that uncertainty gives rise to the likelihood of erroneous decisions in future cases, its very existence is inconsistent with the First Amendment itself. *See generally Speiser* v. *Randall*, 357 U.S. 513, 525-26 (1958); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964); Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. Rev. 685, 701-05 (1978).

---

[7] The Supreme Judicial Court's stated uncertainty with regard to the meaning of *Richmond Newspapers* takes on added significance because the court in *Globe II* directed trial courts to follow the standards established in *Richmond Newspapers* in determining whether to close trials under § 16A at times other than when the victim was testifying. The court's expressed uncertainty over the "binding rule of law" emanating from *Richmond Newspapers* thus is likely to have an impact on its supervision of the discretionary aspect of § 16A.

I. Massachusetts General Laws c. 278, § 16A as Construed by the Supreme Judicial Court Violates the First Amendment to the Constitution of the United States as Applied to the States through the Fourteenth Amendment.

A. *The First Amendment Right to Attend Criminal Trials Requires that Such Trials be Open in Their Entirety Unless Closure, in Whole or in Part, Represents the Least Drastic Means for Achieving an Overriding Governmental Interest.*

This Court's recent decision in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), made explicit for the first time that the First Amendment, as applied to the states through the Fourteenth Amendment, embodies a right on the part of the press and the public to attend criminal trials. *Richmond Newspapers* involved the fourth trial of a criminal defendant on murder charges stemming from the 1975 stabbing death of a hotel manager. Before the trial began, counsel for the defendant moved that it be closed to the public. The prosecution did not object and the trial judge, exercising the discretion he thought was conferred upon him by Virginia Code § 19.2-266, ordered the courtroom closed to all parties except witnesses during the course of their testimony. Appellant Richmond Newspapers moved to vacate the closure order and that motion was denied in a closed hearing. The trial of the criminal case proceeded in a closed courtroom until the trial judge entered a finding of "Not Guilty" at the conclusion of the prosecution's case. Thereafter, the newspaper filed petitions for writs of mandamus and prohibition and an appeal from the trial court's closure order, all of which were denied by the Virginia Supreme Court. The newspaper then filed an appeal with this Court.

In what was described by Justice Stevens as a "watershed case," this Court reversed the judgment of the Virginia Supreme Court. Although no single opinion was adopted by a majority of the Court, the basic theme to which all but one of the members of this Court subscribed was that

> the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to

> attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated.". . .

Richmond Newspapers at 580, *quoting Branzburg* v. *Hayes*, 408 U.S. 665, 681 (1972).

To be sure, none of the opinions rendered in *Richmond Newspapers* stated that the rights there described were absolute. The plurality opinion, however, did indicate that the standard for closure should be high indeed, and that the decision to close trials should be made by the trial judge on a case-by-case basis. Thus, as the plurality opinion put it, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Richmond Newspapers* at 581. Several of the concurring opinions also adverted to the very limited circumstances under which closure was appropriate. Justice Stewart, for example, suggested that closure was appropriate only when, and to the degree, necessary to serve what might be viewed as mechanical interests similar to those which historically have given rise to reasonable "time, place, and manner" restrictions on First-Amendment rights. *Id.* at 600. Justice Blackmun implicitly reaffirmed the standard for trial closures which he first advanced in *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 440 (1979) (Blackmun, J., dissenting), *i.e.*, that closure is permissible only when "strictly and inescapably necessary." *Richmond Newspapers* at 601 (Blackmun, J., concurring).

Notwithstanding the absence of a unified dispositional principle, the plurality and concurring opinions in *Richmond Newspapers* all subscribed to the basic proposition that, where governmental action potentially infringes on First-Amendment rights, the action must be exactingly crafted to achieve the governmental interest at stake without unnecessary abridgement of important rights. In that regard, the decision, despite its potentially far-reaching consequences, traversed a well-blazed path. Countless decisions of this Court prior to *Richmond Newspapers* have clearly established that "[b]road prophylactic rules in the area of free expression are suspect . . . . Precision of regulation must be the touchstone in

an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). Phrased another way, "a governmental purpose to control or prevent activities constitutionally subject to . . . regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964). *Accord*, *Schaumburg* v. *Citizens for Better Environ.*, 444 U.S. 620, 635 (1980). *See generally Note, The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970). In order to avoid undue imprecision, it is always necessary under the First Amendment to focus precisely on the state interest asserted, to reach a judgment concerning its importance, and then to determine whether the interest can be achieved through measures less drastic than those the government has implemented. *See, e.g.*, *Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 95-96 (1977); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 217-18 (1975); *Gooding* v. *Wilson*, 405 U.S. 518, 521-22 (1972); *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 463-64 (1958).

At bottom, all of the opinions in *Richmond Newspapers*, save one, recognized the principles just described. While, for various reasons, several of those who concurred in the judgment found it unnecessary to examine in detail the strength of conceivable state interests or the possibility that they could have been achieved through less drastic means, all recognized, at least implicitly, the necessity for the Court to do so in an appropriate case. This is that case, for the Supreme Judicial Court's decision simply does not reflect proper application of standard First-Amendment analysis.

B. *The Interests Identified by the Supreme Judicial Court are Insufficient to Require Closure of All Testimony of All Victims at All Trials Comprehended by M.G.L. c. 278, § 16A.*

In its opinion in *Globe II*, the Supreme Judicial Court held that, to determine the constitutionality of the mandatory closure requirement of § 16A, a three-fold inquiry was necessary. That

inquiry, in the court's view, required it to ascertain: (1) whether closing the testimony of the minor victim of a sexual assault violated the same tradition of open proceedings as the closing of an entire murder trial; (2) whether closure impeded the flow of information necessary to the functioning of democratic institutions; and (3) whether there were substantial state interests underlying the statute which could not be furthered by more tightly drawn regulations intruding to a lesser degree on the constitutionally protected interests of the press and public (App. 65a). As will be discussed, the first two inquiries engaged in by the Supreme Judicial Court are not the appropriate inquiries in light of the standards established by *Richmond Newspapers*. The outcome of the court's analysis with respect to the third inquiry reflects the court's misapprehension of the central meaning of *Richmond Newspapers* itself.

In analyzing the first question, relating to the role of tradition, the Supreme Judicial Court concluded that trials of crimes involving sexual assaults were a "notable exception" to the "unbroken tradition of openness" which inheres in the trial of other crimes (App. 65a). The court's reliance on a perceived exception to the historic tradition of open trials both misses the point established in *Richmond Newspapers* and misapprehends the strength and nature of that tradition.

To be sure, all opinions in *Richmond Newspapers*, as well as all opinions in *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979), reviewed in some detail the presumption of openness which has historically attended the trial of criminal cases. Ultimately, however, it was the "*constitution* that [the Court was] expounding." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original). While history may help shape the meaning of the Constitution as applied to a current problem, surely history does not freeze constitutional rights in a mold formed by years gone by. *See, e.g., Brown* v. *Board of Education*, 347 U.S. 483 (1954); A. Bickel, *The Least Dangerous Branch*, 108-10 (Bobbs-Merrill, 1962). This is not to say that history is irrelevant but simply that it is not dispositive in the current interpretation of constitutional rights.

Moreover, to give a "notable exception" the weight to which it is entitled in forming current judgments, it is necessary to have an accurate understanding of what the exception is. Statutes and judicial decisions of numerous states do in fact *permit*, and for years have *permitted*, a trial judge to exclude the press and public from portions of certain types of criminal trials, including trials of crimes involving sexual assaults.[8] Even prior to this Court's decision in *Richmond Newspapers*, however, these statutes and cases were uniformly permissive only. Despite a thorough search, the *Globe* has been unable to find any state statute, other than § 16A, containing mandatory provisions for exclusion of the press or general public from all or part of a criminal trial.[9] Thus, if there is a notable exception to the tradition of openness for trials of crimes involving sexual assaults, it is one which *permits* the trial judge to close portions of the trial but does not *require* him to do so.

A review of the authorities cited by the Supreme Judicial Court in *Globe II* in support of the "notable exception" makes the extremely limited nature of that perceived exception abundantly clear (App. 65a-66a, 67 n.12). None of the cases cited by the court involved mandatory closure of all or certain portions of a trial. In each case, closure resulted from an exercise of discretion on the part of the trial judge.[10] The same is true

---

[8] *See, e.g.*, authorities cited in *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 388 n.19 (1979).

[9] Some state statutes do require exclusion of *minors* from certain criminal trials unless it is necessary for them to be present. *E.g.*, Vermont Stat., tit. 12, § 1901. *But see* M.G.L. c. 220, § 13A. Those statutes, however, rest on very particular grounds and cannot be viewed as a springboard for "traditional" exclusion of adults. *See generally Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

[10] It also should be noted that the cases cited by the court call into question the very existence of an exception to the rule of openness, at least as it applies to the *Globe*. In three of the six cases cited by the court for the proposition that there is an exception to the tradition of openness for trials of crimes involving sexual assaults, the press was allowed to remain despite the exclusion of members of the general public. *United States ex rel. Latimore* v. *Sielaff*, 561 F.2d 691 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978); *Douglas* v. *State*, 328 So.2d 18 (Fla.), *cert. denied*, 429 U.S. 871 (1976); *Price* v. *State*, 496 S.W.2d 103, 107-08 (Tex. Crim. App. 1973).

with respect to the three state statutes cited by the court — each is permissive and not mandatory.[11] There is, in sum, no "notable exception" to the history of open trials which uniformly and without leeway requires exclusion of the public from any part of a trial involving a sexual offense.

The court answered the second question it posed, *i.e.*, whether the mandatory closure aspect of § 16A impedes the flow of information necessary to the functioning of democratic institutions, by concluding that the impediment undoubtedly flowing from closure was offset by the general ability of the public to observe trials of sex-related crimes which did not involve minors (App. 67a-68a). In essence, then, the court concluded that the partial closure in cases like this one would have a *de minimus* impact on the flow of information necessary for the sound operation of a democracy because of the general availability of different information elsewhere.

With all due respect, to draw such a conclusion is to enter dangerous territory. With good reason has this Court expressed serious reservations about the wisdom of committing to "the conscience of judges" the task of determining what information is or is not relevant to democratic institutions. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). Instead, because "[f]reedom of discussions, if it would fulfill its historic purposes, must embrace all issues about which information is needed or appropriate in order to enable the members of society to cope with the exigencies of their period," *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940), this Court has

---

[11] Alabama Code § 12-21-202 (1975) ("In all prosecutions for rape and assault with intent to ravish, the court *may, in its discretion*, exclude from one courtroom all persons, except such as may be necessary in the conduct of the trial") (emphasis added); New York Jud. Law § 4 (McKinney 1975) ("in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court *may, in its discretion*, exclude therefrom all persons who are not directly interested therein") (emphasis added); North Carolina Gen. Stat. § 15-166 (1975) ("In the trial of cases for rape or a sex offense or attempt to commit rape or attempt to commit a sex offense, the trial judge *may*, during the taking of testimony of the prosecutrix, exclude from the courtroom all persons except the officers of the court, the defendant and those engaged in the trial of the case") (emphasis added).

interpreted the First Amendment broadly to protect traffic in all ideas "regardless of their social worth." *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969). *See generally Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965) ("the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."). Bluntly put, it is not the business of the judiciary — indeed, it is not the business of any governmental institution under our system — to make value judgments about the social worth of information[12] or to measure the impact on democratic institutions of suppressing some information by reference to the quantum of information which remains in the public domain.

The final inquiry engaged in by the Supreme Judicial Court was whether the mandatory closure aspect of § 16A served "substantial state interests" which could not be furthered by more tightly drawn regulations. The court found that § 16A served essentially three state interests: (1) an interest in sparing juveniles the "public degradation, humiliation, demoralization and psychological damage" of testifying in an open courtroom and the allied interest of promoting the "likelihood of credible testimony" by juvenile victims; (2) an interest in protecting minors from the stigma of having been victims of sex crimes; and (3) an interest in the "sound and orderly administration of justice," including an interest in encouraging victims to come forward and institute complaints (App. 68a). Moreover, it found that these interests could not be furthered by the less restrictive alternative of granting the trial judge discretion to make a case-by-case decision on closure or permitting the victim to waive the statute's protection. The court felt that any hearing prior to closure would become an elaborate "side trial," destructive of the very interests sought to be protected (App. 69a n.15). A waiver procedure, in the court's

---

[12] This Court's treatment of pornography perhaps represents an exception to the thoughts just expressed. *See Miller* v. *California*, 413 U.S. 15, 24 (1973). To identify that exception, however, is also to identify the quagmire into which one is ineluctably led when one begins to measure the scope of constitutional protection by the "worth" of the information for which protection is sought.

view, would involve "the same kind of potentially damaging inquiry" to determine the victim's psychological vulnerability (App. 69a n.15). None of the interests identified by the Supreme Judicial Court, however, is sufficient to support § 16A's global reach and all can be achieved through closure decisions made on a case-by-case basis.

As stated, the first interest identified by the court in *Globe II* is the interest in sparing juveniles the embarrassment of testifying candidly and accurately in an open courtroom (App. 68a). Several courts, however, have found that what might be called the "embarrassment" interest is, in and of itself, insufficient to support closure of a criminal trial to press and public. *State* v. *Sheppard*, 42 C.L.J. 23 (Conn. 1980) (involving minor rape victim); *Lexington Herald Leader Co.* v. *Tackett*, 601 S.W.2d 905 (Ky. 1980) (involving minor sodomy victim); *State* v. *Schmit*, 273 Minn. 78, 85, 139 N.W.2d 800 (1966) ("Mere embarrassment of adult witnesses with no showing of inability to testify is not a sufficient reason to defeat . . . an overbalancing constitutional right").

Beyond that, for several reasons, the "embarrassment" interest, even when coupled with a desire to ensure candid testimony, simply is not precise or focused enough to override in all cases the presumptive right of the public to attend criminal trials. *See generally Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85 (1977); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975). To begin with, given the language of § 16A, given the Supreme Judicial Court's prior interpretations of that statute, *e.g.*, *Commonwealth* v. *Marshall*, 356 Mass. 432, 253 N.E.2d 333 (1969) (defendant's father, mother, brother, sister and friends have a right to attend a trial governed by § 16A), and given the requirements of the Sixth Amendment to the Constitution, it is clear that in virtually every trial comprehended by § 16A the testimony of the complaining witness will take place before a sizeable group of unknown court personnel, jurors, attorneys and spectators. The quantum of embarrassment or impediment to candid testimony necessarily added by the presence in the courtroom of a few additional members of the public or of the press thus must remain a matter of conjecture.

The record in this case illustrates the point, for it is wholly insufficient to permit a reasoned conclusion that the Commonwealth in fact was in danger of losing the complainants' testimony if the press were admitted while they were on the witness stand. Indeed, as was mentioned earlier, p. 5 n.3, *supra*, the concerns over press attendance which the victims voiced, albeit after the order of closure was entered for different reasons, were not concerns with which § 16A was equipped to deal and there is no suggestion that they would not have testified, or would have testified differently, had the press been admitted. Beyond that, a tangible risk of the possibility of lost or inaccurate testimony always can be addressed on a case-by-case basis. Couched as it is in mandatory terms, however, that portion of § 16A which requires closure of a portion of the trial does not permit case-by-case analysis and may thus extinguish constitutional rights where their exercise would burden no state interest whatsoever.

Moreover, § 16A is not triggered by the request of a victim for a closed hearing; in fact § 16A requires a closed hearing even if the victim is indifferent to, or, as Justice Wilkins postulated (App. 74a), desires, an open hearing (App. 69a n.15). Surely, a desire to prevent embarrassment of the unembarrassed cannot give rise to an overriding state interest if, indeed, it gives rise to any state interest at all. In any event, a statute which protects even those who would eschew its protection, and which does so at the expense of the First-Amendment rights of others, is clearly overbroad. *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 794-95 (1978).

A second interest which the Supreme Judicial Court found underlying § 16A was the general paternal interest a state has in preventing stigmatization of minors. As identified, this interest was served not only by § 16A, but also by a group of other statutes "designed to protect the identity of minors who are subjects of litigation" (App. 71a n.16). The court, pointing to a number of the Commonwealth's juvenile-delinquency statutes, stated that it would be "anomalous" if the state legislature could protect juvenile offenders by closed hearings but could not do the same for juvenile victims (App. 71a).

However well-motivated, paternalistic state designs do not automatically sweep from their path all countervailing considerations. *E.g.*, *Davis* v. *Alaska*, 415 U.S. 308 (1974); *In re Winship*, 397 U.S. 358 (1970); *Butler* v. *Michigan*, 352 U.S. 380 (1957); *Commonwealth* v. *Joyce*, Mass. Adv. Sh. (1981) 39, N.E.2d . Moreover, the juvenile-delinquency statutes cited by the court are designed in essence to limit the stigmatizing effects of the state's exercise of its penal authority when juveniles are charged with crimes.[13] But the "stigma" which a juvenile criminal may suffer as a result of state action is not analogous to the "stigma" which a victim may suffer as the result of individual criminal activity of some third person acting beyond the control of the state. In the first case, stigma attaches because of state action which brands a juvenile with the potentially indelible mark of criminality. In the second case, state action in the form of a criminal trial serves to remove whatever stigma might otherwise attach. By seeking to prove beyond a reasonable doubt that the defendant was guilty of criminal behavior, the state seeks simultaneously to show that the victim was the innocent target of unlawful aggression. The state interest in conducting that purifying process in secret is much to be doubted.[14]

---

[13] One of the statutes cited by the court, M.G.L. c. 210, § 5C, which preserves the privacy of adoption records, does not appear intended to prevent stigma. *No one* is permitted to inspect these records, not even the adopted child or the adoptive parents, without judicial permission. It seems evident that the legislature intended the statute to assist in a different purpose, *i.e.*, creation of a new legal relationship between child and adoptive parents which could not be later questioned by anyone, including the child or the parents who were the subjects of the adoption decree. *See* M.G.L. c. 210, §§ 6, 7, 8.

[14] As several Justices of this Court have put the matter:

> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done — or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner.". . . It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has

Moreover, if prevention of stigma is the interest the statute is designed to serve, it inevitably must fail to do so. On the one hand, if a minor is, or feels, stigmatized as the result of being the victim of a crime, it is the occurrence of the crime which engenders that perception or feeling. Closing portions of the trial thus comes too late to prevent either untoward result. On the other hand, if publicity is thought to exacerbate existing stigma, then the only solution is to prevent all publicity by closing portions of all such trials and prohibiting the identification of the prosecuting witnesses. That, however, § 16A does not — indeed, could not — do. *E.g.*, *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975); *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979).[15] The Supreme Judicial Court perhaps underscored the inability of the statute to achieve its perceived objectives in this regard when it held that the mandatory aspect of § 16A is not applicable to transcripts containing the minor victim's testimony (App. 68a n.14). The inability of the statute to achieve its stated purpose thus underscores its constitutionally impermissibility. *Smith* v. *Daily*

> been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," . . . and the appearance of justice can best be provided by allowing people to observe it.

Richmond Newspapers at 571-72 (plurality opinion).

[15] As the Commonwealth itself stated in the motion to dismiss this case it filed with this Court during the prior appeal:

> [Section] 16A does not bar the press from requesting a transcript of the testimony; it does not bar it from independent interviews with and reports from courtroom observers including family and friends of the victim and accused who have a "direct interest" in the trial and who therefore are admitted to it under § 16A; it does not bar the press from the entire remainder of the trial unless the judge finds and explains overriding justification for further exclusion; and, of course, it does not bar the press from post-trial contact with any of the participants in the proceeding. In short, the press need only temporarily report around the testimony of the child victim.

Motion to Dismiss at 12. Put another way, if stigma is going to attach, § 16A will not stop it from doing so.

Mail Publishing Co., 443 U.S. 97, 104-05 (1979); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 214-15 (1975).[16]

The third interest identified by the Supreme Judicial Court is the state's interest in "sound and orderly administration of justice," including an interest in encouraging victims to come forward and institute complaints (App. 68a). Again, the basis for asserting that that interest will be served by § 16A is, at best, speculative. The speculative nature of the interest is amply demonstrated by the manner in which the court expressed it in *Globe I*. For example, the court reasoned that the possibility of testifying in public "might" lead a young woman to choose not to cooperate with the prosecution. It also reasoned that "[s]he *might* be deterred from coming forward at all" (App. 41a) (emphasis added). Moreover, the court said that the victim's knowledge that some of the people in the courtroom were "reporters who *might* publish her testimony . . . would *probably* increase . . . her sense of exposure" (App. 43a) (emphasis added). So described, the interest amounts to the kind of "undifferentiated fear or apprehension" this Court views as insufficient to override First-Amendment rights. *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 508 (1969).

It is, moreover, a contradiction in terms to state that closing a trial will assist in securing a "just" conviction when one of the main purposes for having public trials is prevention of overzealous prosecution or biased judgments. This Court emphasized in *Richmond Newspapers* the historical importance of openness in assuring "that the proceedings were conducted fairly to all concerned, and [in discouraging] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers* at 569. *See also In re Oliver*, 333 U.S. 257, 266-70 (1948). There is simply no evidence that closure will do more to secure a "just" conviction than it will do to damage the integrity of the judicial process and thus the justice in which that process results. *See generally Richmond Newspapers* at 569-73.

[16] The underinclusive nature of § 16A is underscored by the fact that, as construed, the statute would not have met the *only* concerns over press attendance at trial voiced by the victims in the case at hand. *See* n.2, *supra*.

In summary, none of the interests identified in *Globe II* which the Supreme Judicial Court found § 16A designed to serve is sufficiently precise to justify mandatory exclusion of the press and public from all testimony of all minor victims during all trials of all crimes covered by § 16A. In the words of the Court in *Richmond Newspapers*, "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Richmond Newspapers* at 576-77.

C. *In Order to Ensure that an Order Closing a Criminal Trial, in Whole or in Part, is the Least Drastic Means for Achieving an Overriding Governmental Interest, a Hearing Prior to Closure is Necessary.*

Returning to the theme with which this discussion started, the analysis just concluded shows that a statute like § 16A, which requires the closure of portions of all trials of certain crimes, is inherently overbroad. That is to say nothing more, but certainly nothing less, than that the statute seeks to achieve its perceived objectives "by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 307 (1964). Ultimately, the concept of overbreadth if a relative one. Assuming the existence of an identifiable and "compelling" or "overriding" state interest, the question becomes in every case whether the government has pursued that interest with sufficient precision in light of available alternatives. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

The mechanism expressly contemplated by the plurality in *Richmond Newspapers* and the dissenters in *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979), for avoiding unnecessarily broad closure orders, is a hearing prior to closure at which the trial judge could explore in some detail the precise interests at stake and alternatives less burdensome than closure by which those interests might be served. Such a hearing permits the judge to base his decision on the particularized factual situation presented. As Justice Wilkins acknowledged in his con-

curring opinion (App. 74a), a legislature's decision is necessarily based on general findings which by their nature cannot be accurate in each individual case. *See generally First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784-86 (1978). A hearing is thus necessary to ensure that the First-Amendment rights of the press and the public will not be abridged unnecessarily. That, at least, is the conclusion of every decision save *Globe II*, which has treated the issue in the wake of *Richmond Newspapers*. *See In re United States ex rel. Pulitzer Publishing Co.*, 635 F.2d 676 (8th Cir. 1980); *State* v. *Sheppard*, 42 C.L.J. 23 (Conn. 1980); *United States* v. *Edwards*, A.2d , Nos. 294 and 401 (D.C. May 8, 1981); *State* v. *Green*, 395 So.2d 532 (Fla. 1981); *Ashland Publishing Co.* v. *Asbury*, 612 S.W.2d 749 (Ky. App. 1980); *Patuxent Publishing Corp.* v. *State*, 48 Md. App. 689, 429 A.2d 554 (1981); *Detroit Free Press* v. *Recorder's Court Judge*, 409 Mich. 364, 294 N.W.2d 827 (1980); *State* v. *Sinclair*, 274 S.E.2d 411 (S.C. 1981); *State* v. *Wahle*, 298 N.W.2d 795 (S.D. 1980); *Herald Ass'n, Inc.* v. *Ellison*, 138 Vt. 529, 419 A.2d 323 (1980).

To state that the First Amendment requires a hearing prior to closure is, however, not to agree with the Supreme Judicial Court's views that the hearing necessarily would be a full-blown evidentiary hearing in which all participants had the right to present expert testimony and to examine and cross-examine the victim (App. 69a n.15). In *State* v. *Green*, 395 So.2d 532 (Fla. 1981), for example, the Supreme Court of Florida held that, while a hearing prior to closure was required, that hearing did not necessarily have to be an evidentiary hearing. The court held that the trial judge in many instances could hold a hearing which gave all parties an opportunity to be heard and could make a decision on the basis of affidavits. In some circumstances, like the one envisioned by Justice Wilkins in his separate opinion in *Globe II* concerning the victim who wants the public to know precisely what a heinous crime the defendant committed (App. 74a), the hearing required by *Richmond Newspapers* could be very abbreviated.

With respect to the role of the press and public, it is necessary, but also sufficient, to provide that reasonable degree of

participation at the hearing which is necessary to guarantee a meaningful opportunity to influence the court's determination. *See generally Carroll* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968). With respect to the scope of the inquiry, *i.e.*, the type of evidence that could be presented, whether oral examination of the witnesses would be allowed or whether the victim could be examined or cross-examined, the sound discretion of the trial court, informed by the necessity for creating a record susceptible to appellate review under the standards enunciated in *Richmond Newspapers*, would surely suffice. Thus, the hearing mandated by *Richmond Newspapers* need not be the elaborate, "cumbersome"[17] one envisioned by the Supreme Judicial Court, but rather could take a number of forms depending on the circumstances of the individual case.

The object of such a hearing, of course, ultimately is an informed conclusion that, in the case then before the court, the interests asserted in support of closure are tangible and substantial and that they can be achieved by measures no less drastic than closure itself. More concretely, in a case arising under § 16A, the object of the hearing should be to determine whether closure is necessary to prevent a high degree of likelihood of serious psychological harm to the victim if testimony is taken in public, whether alternatives to closure will adequately protect against such harm, and whether closure will be effective in protecting against the perceived psychological harm to the young victim. By requiring closure in all cases, § 16A permits no such inquiry and thus invites, indeed requires, closure in cases like this one where closure is wholly unnecessary for achievement of any state interest at all. On its face and as applied to this case, the statute thus is unconstitutional to the extent that it requires closure while the minor victim is testifying.

---

[17] It is difficult to square the Supreme Judicial Court's concern that the pre-exclusion hearing would be a "cumbersome," time-consuming "side trial" with its statement in *Globe I* that the hearing with regard to closure of portions of the trial other than the minor victim's testimony "should be completed expeditiously and should not ordinarily involve lengthy legal argument" (App. 45a). The reason for the distinction between hearings with respect to different portions of trials is not apparent.

II. Massachusetts General Laws c. 278, § 16A Violates Appellant's Rights under the Sixth Amendment to the Constitution of the United States.

In addition to the First-Amendment principles just canvassed, the Sixth Amendment, which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial," also conferred on the *Globe* a right to attend the entire trial of Albert Aladjem, a right that both § 16A and the closure order violated. The Supreme Judicial Court declined to address the *Globe*'s Sixth-Amendment claims in any comprehensive fashion on the grounds that the *Globe* had no standing to raise those claims, claims the court considered personal to Mr. Aladjem. The court also held that the *Globe* did not bear a relationship to Mr. Aladjem which might allow it to raise those claims on his behalf. Under the narrow circumstances of this case, however, the mere fact that Mr. Aladjem, acquitted below, is not actually present before the Court should not end the Sixth-Amendment inquiry.[18]

To begin with, there is little that can be said about the Sixth-Amendment issue here posed which was not said in one or more of the opinions in *Gannett Co.* v. *DePasquale*, 443

---

[18] The Supreme Judicial Court also concluded that this Court's remand order required it to consider First-Amendment issues only because "the various opinions in *Richmond Newspapers* are based on the First Amendment, not the Sixth Amendment" (App. 61a n.5). Thus, in effect, the court construed the order of this Court to reconsider the case in light of *Richmond Newspapers* as an affirmance of its denial of the *Globe*'s Sixth-Amendment claims. That interpretation of this Court's order seems unwarranted. This Court's order vacated the *Globe I* judgment completely, not simply with regard to its First-Amendment aspects. Moreover, the plurality opinion in *Richmond Newspapers* expressly stated that *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979), holding that the press and public have no standing to assert a Sixth-Amendment right in the teeth of a desire by all parties to a criminal proceeding for a closed hearing, was limited to pretrial proceedings alone. *Richmond Newspapers* at 564. As a result, it appears that four current members of this Court believe that the Sixth Amendment does afford the press and public a right to attend pretrial hearings as well as trials and at least two others are of the view that *Gannett* did not foreclose the possibility that the Sixth Amendment embraces a public right of attendance at trials themselves.

U.S. 368 (1979). The appropriate question, therefore, concerns the impact of that decision on this case. At the outset, the Sixth-Amendment issue with which the majority dealt in *Gannett* concerned pretrial hearings alone, despite the sometimes broad language of its opinion. In this Court's words:

> There is no question that the Sixth Amendment permits and even presumes open trials as a norm. But the issue here is whether the Constitution *requires* that a pretrial proceeding such as this one be opened to the public, even though the participants in the litigation agree that it should be closed to protect the defendants' right to a fair trial. The history [of the Sixth Amendment demonstrates that the Amendment was not] . . . intended to create a constitutional right in strangers to attend a pretrial proceeding, . . . [but] was to confer upon the accused an explicit right to demand a public trial. . . .

Id. at 385-86 (emphasis in original).

That the *Gannett* holding applies only to pretrial proceedings and not to the trial itself was further discussed in *Richmond Newspapers*:

> In Gannett Co. v. DePasquale, supra [443 U.S. 368 (1979)], the Court was not required to decide whether a right of access to *trials*, as distinguished from hearings on *pre*trial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a *pre*trial suppression hearing. . . .

Richmond Newspapers at 564 (plurality opinion) (emphases in original).

The narrow holding of *Gannett* thus is that the public may not raise the Sixth Amendment as a constitutional bar to an order closing a pretrial hearing where an open hearing poses a "reasonable probability of prejudice" to a defendant's right to a fair trial and where all participants in the hearing agree on closure. *Gannett* at 393-94.

To state this Court's holding in *Gannett*, then, is to distinguish it at once from the present case. Here we are dealing with a trial, not with a pretrial proceeding. Here the prosecutor did not request closure, and here the defendant specifically objected to the closure order. Whatever might be said of a "stranger's" standing to assert a Sixth-Amendment right to a public trial when the criminal defendant abjures that Amendment's protections, it seems clear that standing should exist when the defendant himself seeks to assert at a trial the rights the Amendment provides.[19]

A number of decisions of this Court support the conclusion, albeit by way of analogy, that the public and the press have standing to assert rights under the Sixth Amendment when the defendant himself demands a public trial. This Court has recognized, for example, that a party has standing to assert the constitutional rights of third parties if the litigating party alleges a sufficient interest in the outcome, if "the enjoyment of [a] right [by the third party] is inextricably bound up with the activity the litigant wishes to pursue" and if there is some practical impediment to the third party's ability to assert his own rights. *Singleton* v. *Wulff*, 428 U.S. 106, 112-16 (1976) (opinion of Blackmun, J.). *See also Carey* v. *Population Services International*, 431 U.S. 678, 684 (1977) (parties are permitted "to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function"); *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965); *Barrows* v. *Jackson*, 346 U.S. 249 (1953). Granting standing to such third parties is particularly appropriate where the challenged statute will have a direct adverse impact on that third party. *Eisenstadt* v. *Baird*, 405 U.S. 438, 445-46 (1972) (distributor of contraceptives can assert constitutional rights of individuals to receive contraceptives).

---

[19] This factor alone demonstrates the important difference between the present situation and that presented in *Gilmore* v. *Utah*, 429 U.S. 1012 (1976), cited by the Supreme Judicial Court (App. 61a n.5). In *Gilmore*, it was determined that the defendant had affirmatively waived any rights he had to appeal his conviction to this Court and that he was in fact opposed to the application for a stay of execution of the lower court's sentence sought by his mother as "next friend." *Gilmore* at 1013-15 (Burger, C.J., concurring).

Principles drawn from the foregoing cases strongly support a conclusion that, as a party directly affected by a closure order entered under § 16A, the *Globe* has standing to assert the Sixth-Amendment rights of Mr. Aladjem who desired a public trial. The closure order had a direct impact on the *Globe* because it prohibited activity in which the *Globe* desired to engage. The *Globe*'s interests are "inextricably bound up" with the criminal defendant's interest in having this trial publicized so that abuses may be detected and curbed and so that potential witnesses will come forward and testify. Particularly where, as here, the criminal trial ends in an acquittal, the criminal defendant's public-trial claim may be moot in every sense of the word for he cannot be retried for the same offense, and any assertion that he might be faced with a closure order in a future trial for a future alleged violation of the same statute would be wholly speculative. Imminent mootness of the criminal defendant's public-trial claims thus is a very real and practical impediment to its vindication each time that claim is made. *Compare Singleton* v. *Wulff*, 428 U.S. 106, 117-18 (1976) (opinion of Blackmun, J.).

Turning to the merits, there can be no doubt that the right to a public trial is firmly engrained in our notions of ordered liberty. Indeed, it stands among very few of the absolutes contained in the Bill of Rights to which this Court, despite the passage of nearly 200 years, has not squarely announced an exception. That fact, coupled with the critical role in the pursuit of justice played by the public trial, implies, if indeed it does not dictate, that a criminal trial may not be closed, in whole or in part, at least over the objection of a defendant unless closure is inescapably necessary to safeguard a state interest of the highest order, unless there are no less drastic methods available for pursuing that interest and unless it is clearly demonstrated that the closure order will effectively guard against the perTeived danger. *See Gannett Co.* v. *DePasquale*, 443 U.S. 368, 441-42 (1979) (Blackmun, J., concurring in part and dissenting in part). *See generally Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Oklahoma Publishing Co.* v. *District Court of Oklahoma County*, 430 U.S. 308 (1977); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976).

Section 16A as construed and applied in this case meets none of those criteria. The state interests served by the statute are both speculative and vaguely defined. The statute in its mandatory aspect takes no account of the desires of the individual it is supposed to protect, countenances no suggestion that protection may be afforded through more moderate means, and permits no evaluation of the harm from which protection is sought. Finally, as an effective refuge from conceivable harm, the statute is seriously deficient. In sum, when measured against a Sixth-Amendment right to a public trial, § 16A simply must give way.

Conclusion.

For the foregoing reasons, probable jurisdiction should be noted and M.G.L. c. 278, § 16A as construed by the Supreme Judicial Court to require exclusion of the press and the public from portions of the trials of certain crimes should be declared unconstitutional.

Respectfully submitted,

JAMES F. McHUGH,
ROBERT HAYDOCK, JR.,
MARC A. REARDON,
BINGHAM, DANA & GOULD,
100 Federal Street,
Boston, Massachusetts 02110.
(617) 357-9300

Appendix.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
SUFFOLK, SS.

THE GLOBE NEWSPAPER COMPANY

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK.

Petition for Extraordinary Relief Pursuant to Mass. General Laws Chapter 211, Section 3

Now comes plaintiff, The Globe Newspaper Company, (the "plaintiff") and respectfully represents:

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts with a principal place of business in Boston, Massachusetts. It is the publisher of The Boston Globe, a newspaper of general circulation in the City of Boston and elsewhere.

2. Defendant, The Superior Court for the County of Norfolk, ("Norfolk Superior Court") is the court which by statute has jurisdiction over certain criminal cases arising within the Commonwealth of Massachusetts and within the venue of Norfolk County.

3. On or about April 19, 1979, the Norfolk Superior Court commenced hearings with respect to preliminary motions in the case of *Commonwealth of Massachusetts v. Albert Aladjem*, Norfolk Superior Court, No. 73102-9. At that time, the Norfolk Superior Court caused to be placed on the courtroom

door a sign which stated "closed." All persons approaching the courtroom doors were told by courtroom personnel that they may not enter the courtroom. Subsequently, certain members of the press were told by court personnel that they could enter the courtroom during the preliminary hearings. On information and belief, one reporter was allowed to enter the courtroom and was informed by Judge Mulkern that the reporter could remain in the courtroom, but should not publish any information that was disclosed in the course of the hearings on preliminary motions.

4. On, April 24, 1979, counsel to the plaintiff went to the Norfolk Superior Court. Counsel was informed that the hearings for that day had been terminated. Judge Mulkern told counsel that the hearings would continue the following day.

5. On April 25, 1979, at the commencement of the proceedings before Judge Mulkern, counsel for the plaintiff filed with the clerk three motions (1) a motion to revoke orders concerning exclusion of the press; (2) a motion for hearing; and (3) a motion to intervene. These documents are attached hereto as Exhibits A-C respectively. The motion to intervene requests that the plaintiff be allowed to intervene for the limited purpose of asserting its rights to access to the trial and hearings on the related preliminary motions. The motion to revoke prior orders refers to prior proceedings of the Court, where the press had been excluded, and requested a transcript of those proceedings. The motion for hearing requested that the plaintiff be granted an opportunity to be heard before the Court with respect to orders excluding the press from the trial and related hearings on preliminary motions.

6. At the commencement of the proceedings, before the Court, Judge Mulkern held that plaintiff's motions would not be accepted for filing. Without the opportunity for hearing requested by plaintiff and without argument of counsel, the Court further ordered that pursuant to G.L. c. 278, § 16A, the

trial would be closed and the press and general public would be excluded. A copy of the transcript relating to these orders is attached hereto as Exhibit D.

7. Counsel to the defendant objected to the Court's order that excluded the press and public.

8. The Assistant District Attorney for the Commonwealth stated that the exclusion of the press and public is not requested by the Commonwealth.

9. The refusal of the Norfolk Superior Court to permit members of the press to be present at the trial constitutes an impermissible burden on the plaintiff's right to gather and disseminate news, is supported by no compelling state interest and is in violation of the First Amendment to the Constitution of the United States and Articles XVI and XXIX of the Massachusetts Constitution.

10. To the extent that G.L. c. 278, § 16A is construed as authority to exclude members of the press from a trial where the defendant requests a public trial and the presence of the press, that statute is in violation of the Sixth Amendment to the Constitution of the United States and Article XII of the Massachusetts Constitution.

11. The trial, including the inpanelment of the jury in this case is scheduled to commence tomorrow, April 26, 1979 and the orders barring entry to those proceedings by the press remain in effect.

12. Plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiff prays that:

1. A short order of notice issue to defendant commanding it to appear forthwith and answer the allegations of this Complaint.

2. That a temporary restraining order issue forthwith commanding defendant to permit members of the press to attend the trial in the case, *Commonwealth of Massachusetts v. Aladjem*, Norfolk Superior Court, Docket No. 73102-9.

3. That this Court issue a permanent injunction ordering defendant to permit members of the press to attend the trial and proceedings in the case of *Commonwealth of Massachusetts v. Aladjem*.

4. For such other, or further, relief as this Court deems meet and just.

By its attorneys,

THOMAS H. WALSH, JR.
JAMES F. MCHUGH
JANIS M. BERRY
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300

Exhibit A.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT
A3102-9

COMMONWEALTH OF MASSACHUSETTS

v.

ALBERT ALADJEM

Motion to Revoke Orders Concerning Exclusion of the Press

The Globe Newspaper Company (the "*Globe*") moves that this Court enter an Order revoking any prior Orders of the Court which exclude the press, including the *Globe* from the trial and related hearings on preliminary motions in the above-captioned case and/or which prohibit the publication of information disclosed in said proceedings. The Globe also moves that a transcript of the proceedings be made available.

By their attorneys,

THOMAS H. WALSH, JR.
JAMES F. MCHUGH
JANIS M. BERRY
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300

DATED: April 25, 1979

Exhibit B.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT
73102-9

COMMONWEALTH OF MASSACHUSETTS

v.

ALBERT ALADJEM

Motion for Hearing

The Globe Newspaper Company moves that it be granted an opportunity for hearing before this Court with respect to any Orders of this Court which exclude the press from the trial and related hearings on preliminary motions in the above-captioned case and/or which prohibit the publication of information disclosed in said proceedings.

By their attorneys,

THOMAS H. WALSH, JR.
JAMES F. MCHUGH
JANIS M. BERRY
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300

DATED: April 25, 1979

Exhibit C.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT
73102-9

COMMONWEALTH OF MASSACHUSETTS

v.

ALBERT ALADJEM

Motion to Intervene

The Globe Newspaper Company hereby moves for leave to intervene in these proceedings for the limited purpose of asserting its rights to access to the trial and hearings on related preliminary motions in connection with the above-captioned case.

By their attorneys,

THOMAS H. WALSH, JR.
JAMES F. MCHUGH
JANIS M. BERRY
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300

DATED: April 25, 1979

Exhibit D.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss: SUPERIOR COURT
No. 73102-9

COMMONWEALTH

v.

ALBERT T. ALADJEM, JR.

Third Criminal Session
Dedham, Massachusetts
Wednesday, April 25, 1979

Transcript of Hearing on Motions

BEFORE: Hon. Robert V. Mulkern, Associate Justice

APPEARANCES:

Ms. Ruth McNiff, Assistant District Attorney,
For the Commonwealth
Paul T. Smith, Esq. and Harvey R. Peters, Esq.
Co-Counsel, For the Defendant

[2] *Wednesday, April 25, 1979*

THE COURT. Now, with respect to the case on trial, I have been handed three motions.

Do counsel for the respective parties have copies of these motions?

Ms. McNiff. No, Your Honor.

Mr. Peters. No, Your Honor.

The Court. One is entitled a "Motion to Intervene" and it is signed by Attorney Thomas Walsh, I believe, and another attorney.

Another is a Motion For Hearing With Respect to Any Orders of the Court Relating to Exclusion of The Press.

And the third is a Motion to Revoke Orders concerning exclusion of the press.

Would counsel for the respective parties now have copies of those motions?

Mr. Smith. Yes, Your Honor.

The Court. Do you, Miss McNiff?

Ms. McNiff. Yes, Your Honor, I do.

The Court. Would you like a moment to read them?

Ms. McNiff. Yes, I would.

The Court. Please do.

[Pause.]

[3] The Court. Have counsel now had an opportunity to read this motion?

Ms. McNiff. Yes, Your Honor.

Mr. Peters. Yes, Your Honor.

The Court. I will take, first, the Motion to Intervene, which has not been filed.

It has simply been handed to the Court. The case before the Court, the criminal case of Commonwealth v. Aladjem, involves three high school girls, ages at the time of the offense, 15, 16 and 17, respectively; and I ask to be corrected by Miss McNiff if I am wrong in what I say.

Ms. McNiff. You are correct, Your Honor.

The Court. The ages, now, are 16 and 17; am I correct on that?

Ms. McNiff. Sixteen, sixteen and seventeen.

The Court. Sixteen, sixteen and seventeen.

The three girls are high school students as of this time. The allegations of the indictments contain allegations of forcible rape and allegation of forced unnatural rape, in at least one instance.

Am I correct, Miss McNiff?

Ms. McNiff. You are correct, Your Honor.

The Court. The statute in question is General Laws Chapter 278 Section 16A, which provides that at a [4] trial of indictments such as are before the Court, when the alleged victims are under eighteen years of age, the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case. This statute parallels, in a general way, General Laws Chapter 119 Section 65, which provides that in a juvenile session, where a defendant is a juvenile, the Court shall exclude the general public from the room admitting only such persons as may have a direct interest in the case.

This Court rules that the Motion to Intervene may not be filed. That the Globe Newspaper Company, which is named in the body of the motion, is not a party to the litigation on trial before the Court. This Court further rules that, consistent with General Laws Chapter 278 Section 16A, this trial will be conducted in such a manner that the general public shall be excluded from the courtroom, including the press, and that only such persons as may have a direct interest in the case will be permitted in the courtroom.

This ruling and Order results from a reading of the statute and from the feeling of the Court that a child-victim of an alleged sexual attack is entitled minimally to at least the same protection that a child-[5] defendant in a case involving sexual matters has.

I will advise the representatives of the Globe newspaper that are present in the courtroom that it is not anticipated that impanelment of this case will commence until tomorrow, for whatever action those representatives care to take.

Okay.

I am returning the papers which have been presented to the Court.

Ms. Barry. Pardon me, Your Honor. My name is Janice Barry and I represent the Globe Newspaper Company.

Is Your Honor also ruling that the Globe's Motion For a Hearing on the Closure Order is also denied?

The Court. Well, Miss Barry, I took the motions in what I thought was an appropriate order. Since I will not accept for filing the Motion to Intervene, for the reason that I have indicated, basically a question of standing, then I am not going to act upon any other motions.

Ms. Barry. Then, Your Honor, as I understand, is saying that the Globe has not standing to be heard before Your Honor?

The Court. I am saying no more. I am not [6] accepting for filing the Motion to Intervene.

Ms. Barry. Thank you, Your Honor.

The Court. You are welcome.

Mr. Peters. Would Your Honor note the Defendant's exception to so much of Your Honor's ruling as excludes the general public and the press from the trial in this case.

The Court. You have made your exception.

[Defendant's exception noted.]

Ms. McNiff. Not to be technical, Your Honor, but, for purposes of the record, may the record indicate that Your Honor's ruling was on Your Honor's own motion and not at the request of the Commonwealth?

The Court. His Honor's ruling was made on the basis of the statute which appears at least to be mandatory.

Ms. McNiff. I understand that, Your Honor.

Thank you.

Okay. Let's proceed with the — I am sorry, gentlemen.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS: SUPREME JUDICIAL COURT
No. 79-191 CIV. BRAUCHER, J.

THE GLOBE NEWSPAPER

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK

Appearances:

Charles J. Hely, Assistant District Attorney
618 High Street
Dedham, Massachusetts 02026

Margot Botsford, Assistant Attorney General
1 Ashburton Place
Boston, Massachusetts

James F. McHugh, Esq.
100 Federal Street
Boston, Massachusetts

April 26, 1979
Full Court Room-13th floor
New Court House
Boston, Massachusetts

[Partial Transcript of Proceedings.]

The Proceeding

COURT: Mr. McHugh, this is your application, I believe.

• • • • • • • • • •

MR. MCHUGH: Thank you, Your Honor. Your Honor, this is an application, as the complaint reveals, under General Laws 211, Section 3, for an order requiring the Justices of the Norfolk County Superior Court to open to the press a criminal trial, which yesterday the Court ordered closed. Factually, the matter arose in essentially the following manner. There had been a series of pretrial hearings, which the Court was holding in this case. A case which involves allegations of rape of three women, ages [2] sixteen, sixteen, and seventeen, I believe, current ages, in the town of Wellesley. During the last several days a number of pretrial hearings had been held by the Court and all of those hearings had been closed to the press and to the public. At some point yesterday, the Globe became aware of the possibility that an order would be entered seeking to close, or ordering closed, the trial itself. And thereupon, counsel for the Globe went to the Norfolk Superior Court and attempted to talk with the Judge and determine what the Court's views in that regard were. The Court said, as I understand it, that it would take the matter under advisement and would have some kind of a decision ready the following day, which was yesterday, April 25th. On yesterday, the Globe filed with the Court . . ., or more precisely, went to the Court after attempting to determine who the appropriate Clerk to receive the papers was, and finally finding the Judge's court room Clerk, gave to that Clerk a motion to intervene for the limited purpose of asserting its right to attend the trial sessions. A motion for a hearing, prior to entry of any cloture order, and a motion for a revocation of any prior cloture orders that had been entered. The Court, as the transcript attached to our complaint reveals, denied the Globe's motion to intervene and said that it would not take up any of the other

motions, and in addition, entered an order stating that the trial would be closed to the press and to the public under the [3] authority of General Laws Section 16A.

COURT: Well, I don't want to foreclose anybody else from making a point. But, it seems to me, that your procedure adequately raised the question whether the Globe has any right to have the trial public . . .

MR. MCHUGH: All right.

COURT: . . . In the face of the statute. And, I think, maybe you should direct your attention to that.

MR. MCHUGH: All right, Your Honor. We believe, and I am going to urge the Court today, that chiefly for three reasons . . . four reasons the lower court's order was invalid. Succinctly and in summary form put, those are that Section 16A does not by construction require the result the Court reached in this case. Second, that if it does, it is unconstitutional under the First Amendment to the Constitution of the United States. In addition, if it does, it is unconstitutional under the Sixth Amendment to the Constitution of the United States. And finally, that wholly apart from the substantive result one reaches in consideration of those issues, it is a denial of the First Amendment Rights of the press to enter such an order without some form of a preliminary hearing addressed to the merits of the issue concerning whether the trial should be closed.

• • • • • • • • •

[11] COURT: Thank you, Mr. McHugh. Now, Ms. Botsford [Assistant Attorney General Representing the Superior Court for the County of Norfolk] I understand the District Attorney wants to be heard here. I don't know whether you want to be heard before or after.

MS. BOTSFORD: I'll be heard after.

MR. HELY: Just briefly, Your Honor.

COURT: This is Mr.?

MR. HELY: Hely.

[12] COURT: Hely.

MR. HELY: and I don't purport to interfere with, or attempt to represent the Justices of the Court, Your Honor, simply as an intervenor, or as amicus to the Court making clear the District Attorney's position in the underlying criminal action. And, that was before the trial judge, and before this Court today, that we do not oppose the presence of the press in this case. We are fully aware of the statute, Chapter 278, Section 16A. And the interests that we identify primarily are the interests of persons under eighteen who are victims of sex crimes, or as so labeled in the statute. And a special privacy interest in those persons, which according to the statute, outweigh the normal rights of the defendant to a public trial and the normal rights of the public to have access to those trials. And in these special circumstances they outweigh. But our position before the trial judge, and it is before this Court, that in some circumstances a trial judge, when the defendant is asserting his right to a constitutional, public trial, a trial judge may consider that as outweighing the otherwise legitimate statutory interests, particularly where the Commonwealth on behalf of the victims, and this is literally on behalf of the victims in the sense that they were consulted fully by the prosecutor in this case. The Commonwealth waives whatever rights it may have to exclude the press. The constitutionality of the statute, we are not seeking to undermine in [12] any sense. We are simply seeking to have a fair trial in this case in which the guilty person can be found guilty if he is guilty. And the fair trial can proceed without error in the record to subject the Commonwealth and the victims to a new trial. And we also wanted to make it clear here this morning that the victims have been held for trial, the three victims, ages 15, 16, and 17, have been held in the courthouse, held for trial since April 17th and today, I

think, is the eighth day where we are ready to impound. We have had a long series of pretrial motions in which the victims have testified, been subjected to a lot of cross-examination, and it is an extremely high level of anxiety and emotional stress on these people. And, the Commonwealth just simply seeks to go forward today and not have a stay in this case, regardless of your determination of the correctness of the trial judge's ruling we ask that it be a prompt determination one way or the other. And we simply wanted the Court to know that we didn't oppose the access to the press in this case.

COURT: Thank you, Mr. Hely. Before we hear from Ms. Botsford, I would like to also inquire . . . I have not gotten a proof of service here . . . Oh, I do have affidavit of notice, delivery to the Attorney General. But, you said notice was given to the defendants here?

MR. MCHUGH: It was by telephone, Your Honor.

COURT: Telephone notice.

[14] MR. MCHUGH: We, also, yesterday afternoon called the Clerk of the Norfolk Superior Court to inform her that the action was pending here with a request to so notify the defendant in the event that we weren't able to reach them, but we did reach them last night.

COURT: All right, thank you.

MR. HELY: But the defendants, I think, were also under direct order from Judge Mulkern to be there today at 10:00 in Dedham, ready for the Judge's final ruling on the motion to suppress and possibly an impoundment this morning. So, I can understand their absence here today.

COURT: I understand. All right, Ms. Botsford.

MS. BOTSFORD: Your Honor, I have a memorandum here, which I can give to you.

COURT: Go ahead.

MS. BOTSFORD: Your Honor, Judge Mulkern opposes any reversal of his order precluding the press from the trial on sev-

eral grounds. First, as he interprets Section 16A, it requires the exclusion of the press. Second, even if the Court should . . . this Court should find that it is not a mandatory exclusion, he would exercise his discretion and require the exclusion of the press, because he thinks that the rights of the minor victims here demand . . . the rights of privacy demand protection. We believe that if Section 16A is construed to require, or at least to [15] authorize in a Judge's discretion the exclusion of the press, it is constitutional. It does not violate the First Amendment Rights of the press, nor the Sixth Amendment Rights of the defendant. We also contend that the press does not have standing to raise the rights of the defendant to a public trial under the Sixth Amendment.

• • • • • • • • •

[24] COURT: I am not disposed to postpone decision here. As I understand it, it was scheduled to go on with the selection of the jury today. Now, I have been informed that Judge Mulkern has put that off until tomorrow.

Ms. BOTSFORD: Oh.

COURT: So that we are not under an particular gun . . .

Ms. BOTSFORD: When I spoke to him he said he would wait until 11:00, but I guess he has pushed it back some more.

COURT: Well, this is all the information . . . just a report . . .

Ms. BOTSFORD: Right. It is later than when I spoke to him.

COURT: But, either way I am not disposed to . . . I mean this thing . . . Obviously, they are trying to expedite the trial of that case. And I think it can go forward either with, or without the press and I am not disposed to delay things. So, I am getting ready to . . . I've been reading your memorandum, so I won't be accused of denying the Commonwealth a hearing. I am getting ready to . . . I think I am going to decide this before I leave the bench. So, I don't need that . . . I do want to get

some help from Mr. McHugh on what he has to say about *Depasquale*. Have I correctly [25] inferred what that is about?

MR. MCHUGH: You have, Your Honor. But, that case, as Your Honor correctly observed, involved the defendant who wanted things closed, and it only dealt with pretrial proceedings . . .

COURT: Pretrial?

MR. MCHUGH: It has nothing to do with the trial itself.

COURT: Now, in the case before us, we are talking about the trial itself, exclusively. There is no problem . . . The statute, in terms, talks about trial and does not seem to say anything about pretrial.

MR. MCHUGH: That is correct, Your Honor. And we have intentionally not raised here any issues about pretrial . . .

COURT: I mean it might well be read that the trial is a whole process and the pretrial proceedings are a part of it. But, on its face, it just says trial. And that is what we are talking about here is trial.

MR. MCHUGH: That is correct.

COURT: All right.

MR. MCHUGH: On another day we might be back to visit with you . . .

COURT: But, I am right that the New York Court of Appeals, is that who it was in *Depasquale* . . .

MR. MCHUGH: *Depasquale*. That is correct. The Court of Appeals for the State of New York.

COURT: This is all not memory, but inference . . .

[26] MR. MCHUGH: Well, basically . . .

COURT: . . . That I just asscciate *Gannett Co.* with upstate New York.

MR. MCHUGH: Let me tell you briefly what happened, if Your Honor would like me to.

• • • • • • • • • •

[27] MR. MCHUGH: One other point that was raised, Your Honor. The objection of the defendants to the cloture of these hearings is incorporated in the transcript, which is attached to the complaint. And on the last page of the transcript the defendant asks that his objection to the Court's order closing the proceedings be noted.

COURT: I think I had seen that, but I . . . Who is counsel for the . . .

MR. MCHUGH: Mr. . .

COURT: Mr. Peters is it?

MR. MCHUGH: Peters.

COURT: Because I . . . It says, "Mr. Peters: Would Your Honor note the defendant's exception to so much of Your Honor's ruling as excludes the general public and the press from the trial in this case? COURT: You have made your exceptions." So, I think that supports your point.

• • • • • • • • •

[29] COURT: Thank you. I do think that this is one which I ought not to take time to write a great essay about. I propose to go through the issues right now and dispose of this. What I rule on the [30] law is not likely to conclude the matter. These are large issues which are dealt with at a higher level. But we do have to decide what is to happen on this particular case. First as to the statute, it is mandatory in its terms. But, I don't . . . I think I have to decide whether it is utterly mandatory so that it overrides the desires of everybody, prosecutor, victims, defendants, judge and so forth, because even if you allow some room for waiver by the defendant and the prosecutor, I think the Judge must have some discretion as to what he will do with that. And, I am not in the position here to say that he abused such discretion as he had, because, obviously, he had been

through a number of proceedings with respect to this case, which are entirely a closed book to most of us who are here this morning. So I think we are confronted with the constitutional issue. My reading of the First Amendment cases on this is that if you once open a trial there is no such thing as opening it part way. Once you have opened it, it is opened all the way. And the only way to avoid complete publicity is to close the hearing. Now, you can close it and still allow certain people in, obviously the people who have to be there. And apparently, our court has said you can bring in relatives and friends of the defendant. I cannot believe that giving the Judge some discretion in matters of this kind violates the First Amendment anymore than an order for the sequestration of witnesses violates the First Amendment. I don't understand [31] that a newspaper reporter is anything but another citizen who . . . and there is no such thing as having a status conferred by law by being employed by a newspaper or by some other . . . one of the public media that any citizen is free to write a book, fill out a handbill, circulate it, publish it, put it on a plaque and publicize it. And he has just as much right as any newspaper reporter. Now, . . . I'm leaving aside the question whether there may be a difference between the relatives and friends of the defendant and members of the public generally. I suppose you can be admitted . . . For example, a lawyer may be admitted to a proceeding on some understanding that he, at least, will not become a newspaper reporter. So, I don't think the First Amendment point is made out. If there is a requirement under the First Amendment of having a hearing, it seems to me that probably that was satisfied. Although rather summarily satisfied when the Judge did hold a hearing on the question of whether the Globe should be permitted to intervene. I take it, not a great deal of argument was permitted on that. But, it is not clear to me that much had to be said. So, that brings us to the Sixth Amendment right. And I must say,

I find that the most troublesome part of this. And what I say will not conclude the matter. And, I take it this is where the District Attorney is in a rather difficult situation here. If this case goes forward over the defendants's objection and exception as a closed trial and that turns out at some later date [32] to have been an error, the trial may turn out to be a wasted exercise which will have to be done over again. And, what I say today isn't going to have any effect on that, because I don't think even though the defendant has been notified of these proceedings, I don't think he can be thought to be a party in the sense that he would be bound by any ruling that I would make. And that of all this is, that I am not going to interfere on an interlocutory basis with the ruling of the trial judge. My power to do so, under Chapter 211, Section 3, is a power which exists only when no other remedy is provided. And the defendant, a least, has a remedy by appeal. I don't want to try and advise the Globe Newspaper Co. as to whether they have any other remedy, but I am doubtful about their standing to raise the Sixth Amendment issue. So the result will be that this petition will be denied. The Court will be in recess.

— THE END OF TAPE —

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 79-191 CIVIL

THE BOSTON GLOBE

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK

Order

This case came before the Court on the plaintiff's petition for extraordinary relief pursuant to G. L. c. 211, § 3.

There was argument by counsel for the plaintiff and by the assistant attorney general. The assistant district attorney made a statement to the Court on behalf of the prosecution in the underlying criminal matter.

Upon consideration thereof, it is ORDERED that the petition be, and it is hereby, denied.

BY THE COURT (BRAUCHER, J.)

JOHN E. POWERS,
CLERK.

ENTERED: April 26, 1979

A true copy.
Attest:

4-27-79 JEAN M. KENNETT
Asst. Clerk.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 79-191 CIVIL

THE GLOBE NEWSPAPER

vs.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK

Judgment

This case came on for hearing before the Court, Braucher, J. presiding, and the issues having been duly heard and an order entered,

It is ORDERED and ADJUDGED,

that the petition be, and it is hereby, dismissed.

Dated at Boston, Massachusetts, this seventh day of May, 1979.

JOHN E. POWERS
Clerk of Court

A true copy.
Attest:

JOHN E. POWERS,
Clerk of Court

May 8, 1979

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON, February 26, 1980

IN THE CASE No. SJC- 1825

GLOBE NEWSPAPER COMPANY

vs.

SUPERIOR COURT

pending in the Superior Court for the County of Norfolk No. 79-191

ORDERED, that the following entry be made in the docket; viz., —

Appeal dismissed in accordance with the opinion.

BY THE COURT,

PATRICK J. HURLEY, Clerk.

February 26, 1980

See opinion on file.

SUPREME JUDICIAL COURT

GLOBE NEWSPAPER COMPANY
vs.
SUPERIOR COURT

Suffolk. October 9, 1979. — February 26, 1980.

Present: HENNESSEY, C.J., QUIRICO, KAPLAN, WILKINS, LIACOS, ABRAMS, JJ.

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on April 25, 1979.

The case was heard by *Braucher*, J.

James F. McHugh (*Janis M. Berry* with him) for the plaintiff.

Mitchell J. Sikora, Jr., Assistant Attorney General (*Allen B. Sherr*, Assistant Attorney General, with him) for the defendant.

Marguerite M. Dolan, for the Greenfield Recorder, amicus curiae, submitted a brief.

James C. Heigham, for the Massachusetts Newspaper Publishers Association, amicus curiae, submitted a brief.

Thomas G. Simons, District Attorney, & *Stephen R. Kaplan*, Assistant District Attorney, for the District Attorney for the Northwestern District, amicus curiae, submitted a brief.

LIACOS, J. On April 25, 1979, the plaintiff, Globe Newspaper Company (Globe), petitioned a single justice of this court for extraordinary relief pursuant to G. L. c. 211, § 3. The petition challenged the April 25, 1979, order of a trial judge of defendant Superior Court, who acted under the authority of G. L. c. 278, § 16A, to close a criminal trial to the general public. The judge had denied the Globe's motion to

intervene and had denied the Globe's motion for a hearing and motion to revoke the order concerning exclusion of the press. Thus, the Globe sought from the single justice a temporary restraining order and permanent injunction ordering the judge to permit members of the press to attend the trial and related proceedings. On April 26, 1979, as the jury in the criminal trial were being empanelled, a single justice conducted a hearing on the Globe's petition and denied it after stating orally his reasons for his decision. A judgment was entered on May 7, 1979.[1] The Globe appeals. Mass. R.A.P. 1 (b), 365 Mass. 844 (1974).

During the pendency of this appeal, the criminal trial proceeded to its conclusion. Thus, the issue raised before the single justice is now moot, and the appeal from his judgment must be dismissed. The issues raised by this record, however, are significant and troublesome, and are "capable of repetition yet evading review." *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911); *Gannett Co.* v. *DePasquale*, U.S. , (1979).[a] We deem it appropriate therefore to express our views on the issues argued. *Wellesley College* v. *Attorney Gen.*, 313 Mass. 722, 731 (1943). In so doing, we consider matters now part of the record, but which were not put before the single justice.

Although neither the single justice nor this court is compelled to take the allegations in the Globe's petition as true, we may do so in light of the circumstances that the Commonwealth did not file an answer, Mass. R. Civ. P. 8 (d), 365 Mass. 749 (1974), and that the facts alleged in the petition are not disputed. The petition shows that on or about April 19, 1979, the Superior Court in the County of Norfolk commenced hearings with respect to preliminary motions in the case of Commonwealth *vs.* Albert Aladjem, Norfolk Su-

---

[1] The opinion of the United States Supreme Court in *Gannett Co.* v. *DePasquale*, U.S. (1979) (99 S. Ct. 2898 [1979]), had not been given at the time of the hearing before the single justice.

[a] 99 S. Ct. 2898, 2904 (1979).

perior Court, No. 73102-9. The court caused a sign marked "closed" to be placed on the courtroom door, and court personnel turned away people seeking entry.[2] After failing to gain entry on April 24, 1979, counsel for the Globe on April 25 attempted to file with the court the motion to intervene and the other two motions. At the commencement of proceedings before the court, the judge ruled that he would not accept the Globe's motions as being proper for filing. Without holding a hearing and without argument of counsel, the judge ordered that the trial be closed and the press and general public excluded. Counsel for the defendant objected to the closure order, and the assistant district attorney stated that the Commonwealth did not request closure.

The transcript of the hearing before the judge is annexed to plaintiff's petition. It reveals that the Aladjem case involved three girls, ages sixteen, sixteen and seventeen at the time of trial. The indictments contained allegations of forcible rape and forced unnatural rape. The judge ruled that G. L. c. 278, § 16A, requires closure. He stated, "This ruling and Order results from a reading of the statute and from the feeling of the Court that a child-victim of an alleged sexual attack is entitled minimally to at least the same protection that a child-defendant in a case involving sexual matters has."

At the April 26 hearing before the single justice, the Globe and the Attorney General appeared. The assistant district attorney also appeared and stated: "[W]here the defendant is asserting his right to a constitutional, public trial, a trial judge may consider that as outweighing the otherwise legitimate statutory interest, particularly where the Commonwealth on behalf of the victims, and this is literally on behalf of the victims in the sense that they were consulted fully by the prosecutor in this case. The Commonwealth waives whatever rights it may have to exclude the press."

---

[2] Court personnel later told some members of the press that they could enter during the preliminary hearings. Apparently one reporter did enter, but the judge told him that he should not publish information received at the hearing.

In a supplemental statement, the parties stipulated to facts concerning events after the April 26 hearing. In an April 30 conference with the trial judge, the assistant district attorney represented that she had spoken with the three victims about the presence of the press in the courtroom; the victims stated that they would not object to inclusion of the press if the press promised not to print any personal data about them, photograph them, or attempt to interview them. On May 10, 1979, following a jury trial, the defendant Aladjem was found not guilty.

The Globe argues that the single justice erred in denying its petition, claiming that G. L. c. 278, § 16A, did not authorize the judge to exclude the press from the Aladjem trial. This argument relies not only on statutory language and purpose, but also the principle that a statute should be construed to avoid constitutional doubts. We agree in part that the order closing the entire trial was in error. The Globe also raises several constitutional issues. The Globe contends that the First Amendment to the Constitution of the United States and art. 16 of the Declaration of Rights to the Constitution of Massachusetts protect the right of the public and press to be present during the conduct of criminal trials. In particular, the Globe argues that G. L. c. 278, § 16A, is overbroad and was applied unconstitutionally in this case. Also, the Globe maintains that the trial court's failure to hold a hearing on the closure issue violated the Globe's rights to due process of law. Finally, the Globe argues that the Sixth Amendment creates a right in the public to attend criminal trials. We reach only some of these questions today.[3]

---

[3] Indeed, the single justice could have refrained from deciding any issue on the merits. Ordinarily, we will exercise our jurisdiction under G. L. c. 211, § 3, only "if no other remedy is expressly provided." Here it is arguable that the Globe might have sought a declaratory judgment that G. L. c. 278, § 16A, does not authorize exclusion of the press, and that even if it does, the statute violates the First and Sixth Amendments to the

1. The Globe argues that G. L. c. 278, § 16A, is ambiguous and is unconstitutional. Before we can turn to these constitutional arguments, we must construe G. L. c. 278, § 16A, in light of the asserted ambiguity.[4] See *Bellotti* v. *Baird*, U.S. , n.24 (1979);[b] *Poulos* v. *New Hampshire*, 345 U.S. 395, 402 (1953). In considering the claimed ambiguity, we are mindful of two principles of statutory construction. First, "[w]ords or phrases in a statute are to be given their ordinary meaning. They are to be construed according to their natural import and approved usage." *Burke* v. *Chief of Police of Newton*, Mass. , (1978).[c] "[T]he statutory language itself is the principal source of insight into the legislative purpose. . . . [W]here the language of the statute is plain and unambiguous, . . . legislative history is not ordinarily a proper source of construction." *Hoffman* v. *Howmedica, Inc.*, 373 Mass. 32, (1977).[d] However, "[i]f the language of a provision is unclear, a court may look to outside sources for assistance in

---

United States Constitution and art. 16 of the Declaration of Rights. G. L. c. 231A.

However, we think the single justice was correct in hearing this matter in view of the doubts concerning the practicality of an alternative remedy in the circumstances, and in view of the significant public issues raised by the petition. We state our views for similar reasons. See *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 550-551 (1977).

[4] General Laws c. 278, § 16A, reads as follows: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." As to the constitutionality of the "begetting" statute, G. L. c. 273, § 11, see *Commonwealth* v. *MacKenzie*, 368 Mass. 613 (1975). General Laws c. 273, § 11, was subsequently repealed by St. 1977, c. 848, § 7.

[b] 99 S. Ct. 3035, 3049 n.24 (1979).

[c] Mass. Adv. Sh. (1978) 425, 427.

[d] Mass. Adv. Sh. (1977) 1488, 1493.

determining the correct construction." *Rosenbloom* v. *Kokofsky*, 373 Mass. 778, (1977).[e]

We consider three possible ambiguities in G. L. c. 278, § 16A. First, to what part or parts of a judicial proceeding does the locution, "At the trial . . . the presiding justice shall exclude the general public," refer? Second, is the word, "shall" used in a mandatory or directory sense? Third, are members of the press "persons" with "a direct interest" in the case? The Globe urges that the latter two questions mark ambiguities in the statute, and it is at least clear that the language "a direct interest" has required construction in the past. *Commonwealth* v. *Marshall*, 356 Mass. 432 (1969). *Commonwealth* v. *Blondin*, 324 Mass. 564 (1949), cert. denied, 339 U.S. 984 (1950). Because neither party has recognized the ambiguity underlying our first question, we take time to explicate it here.

The word "trial" is itself ambiguous. In determining the meaning of a word in a statute, we look to its ordinary lexical meaning. *Burke* v. *Chief of Police of Newton*, *supra*. "Rather than using terms in their everyday sense, '[t]he law uses familiar legal expressions in their familiar legal sense.'" *Bradley* v. *United States*, 410 U.S. 605, 609 (1973) (citation omitted). In its legal definition of "trial," Webster's New International Dictionary 2705 (2d ed. 1959) suggests that the term has several senses: "In a general sense *trial* includes all proceedings from the time when issue is joined, or more usually when the parties are called to try their case in court, to the time of its final determination; in criminal law the term *trial* is, however, generally restricted to proceedings subsequent to swearing in the jury." This range of meanings also appears in Black's Law Dictionary 1675 (rev. 4th ed. 1968). Despite the dictionaries' suggestion that "criminal trial" should be defined restrictively, our older cases have endorsed a definition of "trial" as "the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of

---

[e] Mass. Adv. Sh. (1977) 2534, 2537.

determining such issue." *Commonwealth* v. *Soderquest*, 183 Mass. 199, 201 (1903), overruled on other grounds, *Commonwealth* v. *Penrose*, 363 Mass. 677, 679-681 (1973). This definition is broader than the lexical definition. Fact-finding hearings may occur before the jury are empanelled. A hearing to determine whether there is probable cause to bind a defendant over for trial is an example. It is not clear whether a hearing on a motion to suppress would constitute "examination . . . of the facts put in issue in a cause." Cf. *Commonwealth* v. *Soderquest*, *supra* (arraignment is not trial). According to our cases' definition, then, the distinction between "trial" and "pretrial" is not plain. But compare Mass. R. Crim. P. 13, 14, Mass. (1979), with Mass. R. Crim. P. 19, 20, Mass. (1979). The recent disagreement among members of the United States Supreme Court concerning the applicability to a motion to suppress of the word "trial," appearing in the Sixth Amendment, is further evidence that the distinction is blurred. See *Gannett Co.* v. *DePasquale*, *supra*. Indeed, it is not clear that the "trial" necessarily encompasses all events occurring after the jury are empanelled. For example, a side bar conference, a hearing of legal arguments, or a voir dire hearing held in the absence of the jury to determine the admissibility of evidence may not meet the *Soderquest* definition. Thus, "trial" has no single, irresistible interpretation.

Even if we assume that "trial" has an unambiguous meaning, the sentence, "At the trial . . . the presiding justice shall exclude the general public," is still ambiguous. "At the trial" is ambiguous, for "At" may mean "throughout," but it may also mean "at some time in" or "during parts of." Thus, the legislative order, "At the trial the presiding justice shall charge the jury," would not imply that the charge should continue throughout the entire trial. On the other hand, "At the trial the presiding justice shall maintain order in the court room" would apply throughout. The meaning of the sentence varies with the nature of the act which the judge is ordered to do. Certain acts, such as a jury charge, occur once and within a limited time. Others,

such as maintaining order, are continuous. And some acts, such as excluding the general public, can logically occur at many stages of the trial. Thus, even if "trial" has a definite signification, neither the words of the statute alone nor the nature of the act commanded settles whether G. L. c. 278, § 16A, requires partial or wholesale closure.

2. In order to resolve the ambiguities in G. L. c. 278, § 16A, we must first consider whether any principles of statutory construction should influence our analysis. At least two such principles exert pressure in this case. It is well-established that a "statute must be construed, if fairly possible so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (Holmes, J.). Accord, *Commonwealth* v. *King*, Mass. , (1977);[f] *Alegata* v. *Commonwealth*, 353 Mass. 287, 290 (1967); *Worcester County Nat'l Bank* v. *Commissioner of Banks*, 340 Mass. 695, 701 (1960); *Ferguson* v. *Commissioner of Corps. & Taxation*, 316 Mass. 318, 323-324 (1944). It is also well settled that a statute in derogation of the common law should be strictly construed, so long as the construction is consistent with the statutory purpose. See *Hayon* v. *Coca Cola Bottling Co. of New England*, Mass. , - (1978);[g] *Vallin* v. *Bondesson*, 346 Mass. 748, 753 (1964); *Houghton* v. *Dickinson*, 196 Mass. 389, 391 (1907).

(a) The Globe raises several questions about the constitutionality of excluding the press from a criminal trial. In the face of those arguments and the United States Supreme Court's uncertain posture on the issues, see *Richmond Newspapers, Inc.* v. *Virginia*, Va. , decided July 9, 1979, which recently has been argued before the Supreme Court on appeal;[h] *Gannett Co.* v. *DePasquale*, *supra*, we seek to shrink the region of possible constitutional doubts

---

[f] Mass. Adv. Sh. (1977) 2636, 2647.

[g] Mass. Adv. Sh. (1978) 1888, 1893-1894.

[h] 46 U.S.L.W. 3178 (No. 79-243) (appeal filed 8/14/79).

about G. L. c. 278, § 16A. Nevertheless, a number of reasons counsel against our deciding those questions today. We take care to point out that, even if we chose to decide the constitutional questions here presented, the question whether the State's interests outweigh a defendant's Sixth Amendment right to a public trial would in no way be before us; the defendant is not before this court. Furthermore, instead of deciding the moot issues of the Globe's First and Sixth Amendment rights, we await the United States Supreme Court's decision in *Richmond Newspapers, Inc.* v. *Virginia*, *supra*. Nor do we reach the question of press or defendant rights under the State Constitution. The Globe's contentions relying on art. 16 were not adequately argued in plaintiff's brief. Mass. R.A.P. 16 (a) (4), 365 Mass. 860 (1974). Indeed, the Globe's brief relegates the Constitution of this Commonwealth to one cursory, conclusory footnote. See *Beaton* v. *Land Court*, 367 Mass. 385, 389, appeal dismissed, 423 U.S. 806 (1975). As for State constitutional rights analogous to those arguably available under the Sixth Amendment, the Globe's brief is silent, and our Constitution is unclear, about the right to a public trial.

Finally, we decline to reach the constitutional questions because "[a] court will ordinarily 'not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of . . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.'" *Fazio* v. *Fazio*, Mass. , (1979).[1] See *Commonwealth* v. *Gustafsson*, 370 Mass. 181, 186 (1976). We can decide the present case on nonconstitutional grounds. Therefore, we do so. Also, because our second principle of construction — that statutes in derogation of the common law should be strictly construed — argues for a construction favoring publicity, our result minimizes constitutional

[1]Mass. Adv. Sh. (1978) 1539, 1553.

doubts about G. L. c. 278, § 16A. Although we do not squarely reach the constitutional questions raised today, we believe that the principles of construction we adopt bring us to a conclusion which approximates the results urged upon us by the Globe on constitutional grounds.[5] We turn to consideration of the relationship between G. L. c. 278, § 16A, and the common law.

(b) Public trials have been the rule at common law since the Anglo Saxons conducted their trials "like an ill-managed public meeting." F. Pollock, The Expansion of the Common Law 30 (1904). *In re Oliver*, 333 U.S. 257, 266 (1948). See generally *Gannett Co.* v. *DePasquale*, U.S. , - n.15 (1979).[j] *Id.* at - [k] (Blackmun, J., dissenting). Although in 1884 Mr. Justice Holmes' famous dicta stated some of the reasons for the rule, *Cowley* v. *Pulsifer*, 137 Mass. 392, 394 (1884),[6] this long established precept, so imbedded in our practice, required no explication until 1949. In *Commonwealth* v. *Blondin*, 324 Mass. at 569-570, while sustaining G. L. c. 278, § 16A, against a due process attack, we noted "the universal practice of our courts, especially in criminal cases, to keep the doors open, except as otherwise provided by statute."

Public trials protect against systematic use of the courts as instruments of political and religious persecution. *In re Oliver, supra* at 268-270. Publicity prevents abuses of a single judge's power. *Id.* at 270-271. See 1 J. Bentham, Rationale of Judicial Evidence 524 (J.S. Mill ed. 1827). The pressure of public scrutiny may deter witness perjury; *Com-*

---

[5] This approximate parellelism extends not only to the substantive doctrine, but also to procedural safeguards. See section 5 *infra*.

[j] 99 S. Ct. 2898, 2908-2909 n.15 (1979).

[k] 99 S. Ct. at 2925-2930 (1979).

[6] "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."

monwealth v. *Bohmer*, Mass. , n.14 (1978),[l] and may engender confidence in court officials. *Gannett Co.* v. *DePasquale*, U.S. , (1979)[m] (Blackmun, J., dissenting). Open trials may also induce members of the public to come forward with new testimony or other evidence. *Commonwealth* v. *Bohmer*, *supra* at n.14.[n] Other benefits of publicity are more abstract. As the audience of the courts' struggle to do justice, the public learns how courts work and may suggest how courts can improve. At the same time, the public experiences the drama of justice being done. Like theater, the judicial drama teaches the audience not to make the participants' mistakes — it deters criminal misconduct — and permits a catharsis — a sense that wrongs have been righted.[7] Thus, the common law practice of open criminal trials improves the quality of justice done in the courts and binds the courts more closely to the society they serve. General Laws c. 278, § 16A, was enacted against the background of the common law tradition, and that is why we said in *Commonwealth* v. *Blondin*,

---

[l] Mass. Adv. Sh. (1978) 316, 330 n.14.

[m] 99 S. Ct. 2898, 2931 (1979).

[n] Mass. Adv. Sh. (1978) at 330 n.14.

[7] "[B]y publicity, the temple of justice adds to its other functions that of a school: a school of the highest order, where the most important branches of morality are enforced by the most impressive means: a theatre, in which the sports of the imagination give place to the more interesting exhibitions of real life. Sent thither by the self-regarding motive of curiosity, men imbibe, without intending it, and without being aware of it, a disposition to be influenced, more or less, by the social and tutelary motive, the love of justice. Without effort on their own parts, without effort and without merit on the part of their respective governments, they learn the chief part of what little they are permitted to learn (for the obligation of physical impossibility is still more irresistible than that of legal prohibition), of the state of the laws on which their fate depends." 1 J. Bentham, *supra* at 525. See Note, Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings, 91 Harv. L. Rev. 1899, 1906-1909 (1978). See also Note, The Right to Attend Criminal Hearings, 78 Colum. L. Rev. 1308, 1323 (1978). On the purpose of the criminal law to foster legal and moral responsibility in the citizenry, see generally Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958).

supra at 571: "It is to be strictly construed in favor of the general principle of publicity."

3. Recognizing the power of the principles favoring publicity, we must identify the precise interests that overmatched the common law rule and thereby justified G. L. c. 278, § 16A, in the Legislature's eyes.[8] In *Blondin*, *supra* at 571, we considered the Legislature's purpose in enacting G. L. c. 278, § 16A. "Doubtless it was thought that female witnesses in particular could come forward, institute complaints, and testify with less reluctance, so that more justice would be accomplished if they could be relieved from the inhibitions imposed by the presence of a curiosity impelled audience." Although this formulation is generally correct, it does not put the matter strongly enough.

Originally enacted in St. 1923, c. 251, with the title "An Act to protect witnesses under the age of seventeen at trials for certain crimes," the statute was designed "for the protection of minors from the vulgar and obscene and from public degradation." 1923 House Doc. No. 1349. In St. 1931, c. 205, the statute was revised as part of a comprehensive reexamination of the treatment of children in the Commonwealth. 1931 House Doc. No. 1200. The Special Commission Established to Investigate the Laws Relative to Dependent, Delinquent and Neglected Children, and Children Otherwise Requiring Special Care stated the statutory purpose: "To spare girls of juvenile age the embarrassment, humiliation and demoralization of testifying to all the sor-

---

[8] "If the statute, because it modifies the common law, is to be strictly construed, yet the construction adopted should advance, rather than defeat, the purpose of the Legislature." *Houghton* v. *Dickinson*, 196 Mass. 389, 391 (1907). The Legislature, of course, has power to create exceptions to the rules of common law, *New Bedford Standard Times Publishing Co.* v. *Clerk of the Third Dist. Court of Bristol*, Mass. , - (1979) (Mass. Adv. Sh. [1979] 515, 522-523), and the common law itself provided for exceptions to the rule of publicity. See *Commonwealth* v. *Blondin*, 324 Mass. 564, 571-572 (1949), cert. denied, 339 U.S. 984 (1950). Thus, we said in *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 546 (1977): "These statutes do not preclude the exercise by judges of a sound discretion to impose reasonable cloture, including impoundment, in other cases when found necessary."

did details of rape, incest, carnal abuse or other crime involving sex, incidental to open trial with examination and cross-examination." *Id.* at 90.

This legislative history reveals that G. L. c. 278, § 16A, stands at the nexus of two overlapping strands of policy; the Legislature wished to shield certain victims of sex crimes from the difficult experience of testifying in public;[9] and the Legislature joined this solicitude for victims with the broad, paternal protection afforded children generally.[10] The rape victim's ordeal in court has been well documented.[11] It

---

[9]Since G. L. c. 278, § 16A, was enacted, the Commonwealth has demonstrated sensitivity for the rape victim's plight in other ways. G. L. c. 41, § 97B (rape victim reporting, prosecuting and counseling services); G. L. c. 41, § 97D (reports of rape and attempted sexual assault must be kept confidential); G. L. c. 233, § 21B (limiting admissibility of evidence of victim's sexual history and reputation). See also *Commonwealth* v. *Gibbons*, Mass. , - , - & n.11 (1979) (Mass. Adv. Sh. [1979] 2168, 2170-2171, 2177-2178 & n.11).

[10]Many statutes are designed to protect the identity of minors who are subjects of litigation. See e.g., G. L. c. 119, § 60A (juvenile court records not open to public inspection); G. L. c. 119, § 65 (excluding public from juvenile court sessions). See also G. L. c. 119, § 60 (limiting uses of delinquency adjudication) held unconstitutional in part in *Commonwealth* v. *Ferrara*, 368 Mass. 182 (1975); G. L. c. 210, § 5C (records of adoption proceedings must be segregated); G. L. c. 276, § 100B (juvenile probation and court records may be sealed after three years from final entry). Generally, the purpose of these statutes is to prevent stigmatization of minors and to encourage rehabilitation. See generally *Police Comm'r of Boston* v. *Municipal Court of the Dorchester Dist.*, Mass. , - , - (1978) (Mass. Adv. Sh. [1978] 685, 699-700, 719-721). In the case of a juvenile defendant, the compulsion of those purposes is strong. In the case of the innocent victim of a sexual assault, the obligation not to aggravate her injuries is very strong indeed.

[11]E.g., J. Bode, Fighting Back, ch. 7 (1978); L. Brodyaga, M. Gates, S. Singer, M. Tucker & R. White, Rape and its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies, chs. 8-9 (1975) (hereinafter LEAA Report); E. Hilberman, The Rape Victim, chs. 2, 7, 8 (1976); L. Holmstrom & A. Burgess, The Victim of Rape, chs. 6-8 (1978); S. Katz & M. Mazur, Understanding the Rape Victim, chs. 12, 14, 15 (1979); J. MacDonald, Rape, 128-130 (1971); C. Bohmer, Judicial Attitudes Toward Rape Victims (D. Chappell, R. Geis & G. Geis eds. 1977); A. Burgess & A. Laszlo, When the Prosecutrix is a Child: The Victim Consultant in Cases of Sexual Assault, in Victims and Society (E. Viano ed. 1976); Libai, The Protection of the Child Victim of a Sexual Offense

has been said that "[t]he court experience, for the rape victim, precipitates as much of a psychological crisis as the rape itself."[12] In fact, the victim may feel that she has been raped twice: once by the defendant and once by the criminal justice system.[13] A rape victim who anticipates humiliation or embarrassment may choose not to come forward at all, or, if she comes forward, may abandon her participation midway through the case.[14] Even if she continues to participate in the criminal process, she may become so distressed that she cannot testify effectively.

This is especially true for the child victim of rape. The child's delicate psyche has few resources to help it withstand the trauma of sexual assault. Furthermore, "[i]t is generally agreed by child psychiatrists that the degree of psychic trauma is as much, or perhaps more, dependent on the way that the child victim is treated after discovery than at the time of the offense itself."[15] Even an adult victim confronted with the criminal justice system is typically "frightened, confused, and reticent."[16] For a child with only the barest understanding of the purposes and procedures of a trial, the act of giving evidence may be particularly difficult and bewildering.[17]

---

in the Criminal Justice System, 15 Wayne L. Rev. 977 (1969); O'Neale, Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution — Or How Many Times Must a Woman be Raped, 18 Santa Clara L. Rev. 119 (1978).

[12] L. Holmstrom & A. Burgess, *supra* note 11 at 229.

[13] J. Bode, Fighting Back, ch. 7 (1978). L. Holmstrom & A. Burgess, *supra* note 11 at 235-236.

[14] S. Katz & M. Mazur, Understanding the Rape Victim, 197-198 (1979).

[15] Libai, *supra* note 11 at 980-981. See E. Hilberman, The Rape Victim, 53 (1976).

[16] LEAA Report at 105.

[17] See A. Burgess & A. Laszlo, *supra* at note 11; C. Bohmer, *supra* note 11 at 166-168. J. MacDonald, Rape, 128 (1971).

One of the most disturbing aspects of the trial for many victims is testifying in public.[18] The victim is often embarrassed to discuss intimate and painful matters before a group of strangers. The victim may also fear that she will be held up to public ridicule. A researcher has described the experience of typical child victims: "[A] child is likely either to be confused and frightened by the presence of many persons, or impressed with this unusual opportunity for enthralling a large audience with his stories. In both cases the public's presence may serve to interfere with the child's powers of recollection and narration. In addition, psychiatrists have observed that 'the victim naturally wishes to avoid publicity, the embarrassment which accompanies questioning by authorities, or courtroom experiences. Children in particular are often profoundly disturbed by this situation.'"[19] Recognizing the problem, judges and commentators have considered clearance of the courtroom during the victim's testimony.[20]

Thus, the purpose of G. L. c. 278, § 16A, is to encourage young victims of sexual offenses to come forward; once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial. See *Commonwealth* v. *Leo*, Mass. , (1979).° In broader terms, the statute's purposes

---

[18] L. Holmstrom & A. Burgess, *supra* note 11 at 227; Libai, *supra* note 11 at 979.

[19] Libai, *supra* note 11 at 1021 (footnote omitted). See E. Hilberman, *supra* note 11 at 53; S. Katz & M. Mazur, *supra* note 11 at 199-200, 233-236.

[20] C. Bohmer, *supra* note 11 at 167. LEAA Report, c. VIII. England and Israel give courts power to exclude the general public when a child victim testifies. Israel, Sweden, and Denmark provide that a court official should question the child privately for the prosecution and defense. See generally Libai, *supra* note 11 at 986-1001; C. Bohmer, *supra* at 167. So, too, a large number of the American States have excluded the public to protect the child victim, either by judicial decision or by statute. See *Gannett Co.* v. *DePasquale*, U.S. at n.19 (99 S. Ct. at 2910 n. 19), for a partial listing of American authority.

° Mass. Adv. Sh. (1979) 2245, 2249.

go beyond protection of juvenile privacy to encompass the State's interest in sound and orderly administration of justice; most important, the statute helps obtain just convictions for the types of crimes from which the victims had often suffered at the hands of the criminal justice system, while their assailants had often gone free. We now construe the statute in light of these purposes.

4. The first question that we must decide is whether the language "At the trial . . . the presiding justice shall exclude the general public" necessarily relates to closure of the entire trial. We have shown the language in question to be ambiguous, and our precedent does not illuminate the point. The legislative history, though equivocal, tends to favor a reading that the statute does not mandate closure of the whole trial. Although the 1931 Special Commission Report speaks of a "private hearing," it does not exclude the possibility that the hearing be private only in part. Moreover, the Report states the purpose of G. L. c. 278, § 16A, as, "[t]o spare girls of juvenile age the embarrassment, humiliation and demoralization of *testifying* . . . incidental to open trial" (emphasis supplied). 1931 House Doc. No. 1200 at 90. In light of the principles favoring publicity, we construe the statute to relate to closure of the trial only during the victim's testimony.[21]

---

[21] The language of G. L. c. 278, § 16C, added by St. 1978, c. 316, more clearly states that the closure order may be for the entire trial or "during those portions of such trial when direct testimony is to be presented." We think this 1978 phrasing not to be inconsistent with the view we take of the earlier analogous statute (§ 16A). The Commonwealth implies that G. L. c. 278, § 16A, mandates closing the entire trial. The Commonwealth goes on to imply that in *Commonwealth* v. *Leo*, Mass. , (1979) (Mass. Adv. Sh. [1979] 2245, 2248-2249), we held that § 16A mandatorily extends the right to a closed trial to the child victim and to her alone. The Commonwealth concludes that the child may make an intelligent and voluntary waiver of her right to full or partial closure. Accordingly, a trial judge should hold a hearing on the waiver issue.

This argument misconceives our holding in *Leo*. We did not say that the victim is the only person who possesses the right to a closed trial. We said that the main purpose of the statute apparently was to protect the

We next consider whether G. L. c. 278, § 16A, requires closure of the trial during the victim's testimony. The Globe argues that the Legislature used the word "shall" in G. L. c. 278, § 16A, in a directory, rather than a mandatory, sense. That is incorrect. Although "[t]he word 'shall' as used in statutes . . . is not of inflexible signification and not infrequently is construed as permissive or directory in order to effectuate a legislative purpose," *Swift* v. *Registrars of Voters of Quincy*, 281 Mass. 271, 276 (1932); see *Myers* v. *Commonwealth*, 363 Mass. 843, 846 (1973), "[t]he word 'shall' . . . is commonly a word of imperative obligation . . .." *Johnson* v. *District Attorney for the Northern Dist.*, 342 Mass. 212, 215 (1961). "The general rule whereby directions to public officers for the protection of public or private rights are mandatory may be applied in a like manner to directions to courts." C. Sands, Sutherland Statutory Construction § 57.16 at 439 (4th ed. 1973). Thus, the mandatory construction appears preferable. Treating the statute as directory would frustrate its purposes. If she were uncertain whether she would have to testify in public, a young woman might choose not to cooperate with the police and the prosecutor. She might be deterred from coming forward at all.

Furthermore, legislative history is relevant to a determination whether a statute is mandatory or directory, and "[t]he deliberate refusal of the General Court to adopt a word which plainly would have conferred discretionary power . . . [may], in place of one whose natural purport

---

Commonwealth's case by protecting its witnesses. *Id.* at 2249. Therefore, it was clear that the statute did not give a defendant the right to a hearing from which the press was excluded.

The Commonwealth's suggestion would also place the trial court in the awkward position of having to rule on a child's putative waiver of an important right. Use of a waiver doctrine in this context would entail difficult factual determinations and relatively cumbersome procedures (appointment of counsel and in some cases a guardian). It would place a heavy responsibility on even a mature child. It could also import more uncertainty into the process of testifying and make the victim's experience still more taxing.

would compel them . . . [shall], is significant of a settled intention to use the imperative word." *Rea* v. *Aldermen of Everett*, 217 Mass. 427, 431 (1941). Here the Legislature in 1923 sent the Governor a bill, 1923 House Doc. No. 1219, stating that "the court shall exclude the general public. . . ." The Governor returned the bill with amendments including a change from "shall" to "may." In an accompanying message, the Governor said, "A statute giving the presiding judge the discretion to exclude the public . . . ought to be sufficient. . . ." 1923 House Doc. No. 1349. The version eventually enacted appears to have been a compromise. It provided that "the presiding justice shall, if said trial is before a district court, or may, if before the superior court, exclude the general public . . . ." St. 1923, c. 251. When the Special Commission reviewed the statute in 1931, it stated: "The Commission is very strongly of the opinion that the reasons for a private hearing in such cases, now mandatory in the district courts, are equally compelling in the Superior Court, and the Commission recommends that the above section 16A be amended so that the presiding justice, whether in the Superior or District Court, shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." 1931 House Doc. No. 1200 at 90. The Legislature followed the commission's recommendation. This legislative history leaves little room for doubt that the word "shall" in G. L. c. 278, § 16A, is mandatory as to the victim's testimony.[22]

The Globe contends that it should not be excluded under G. L. c. 278, § 16A, because it is among "such persons as

---

[22] This view is further supported by the language of G. L. c. 278, § 16B (inserted by St. 1949, c. 302), where, as to criminal proceedings in the district court involving husband and wife, it is stated, "[t]he presiding justice . . . may exclude the general public . . . during the trial." General Laws c. 278, § 16C (inserted by St. 1978, c. 316), deals with rape or incest trials and provides that a trial judge "may" exclude "all spectators" on request of the parties and where the defendant waives his right to a public trial in writing. The Legislature clearly knows the difference between the permissive "may" and the mandatory "shall."

may have a direct interest in the case." In *Blondin*, *supra* at 571, the Globe argues, we provided for liberal construction of the clause, and we said: "The intent was to distinguish between persons having a legitimate reason for being present and mere idle spectators who are often attracted in large numbers to sensational trials involving sex issues, not only to the detriment of the community but sometimes to the degradation of justice itself." Because the Globe's reporters have a legitimate reason to attend the trial, a reason unrelated to voyeurism, the Globe argues they have a "direct interest."

We have never said that the "direct interest" clause encompasses the press, and in *Blondin*, *supra* at 572, we expressly reserved the question. We have stated in dictum that the statute does not require exclusion of the defendant's parent, husband, wife, guardian or friend. In *Commonwealth* v. *Marshall*, 356 Mass. 432 (1969), we held that a defendant had a right under G. L. c. 278, § 16A, and the Sixth Amendment to have his mother, brother, sister, and friend present at his trial. However, including a few of the defendant's associates is an entirely different matter from including the press. Admittedly, the presence of a few more persons in the courtroom might not appreciably increase the victim's anxiety about her testimony. But the knowledge that those few extra persons were reporters who might publish her testimony to thousands would probably increase by orders of magnitude her sense of exposure, vulnerability, and alarm. We believe that a policy of admitting the press during young victims' testimony would substantially increase the risk that the Commonwealth would lose the benefit of that testimony.

5. In holding that G. L. c. 278, § 16A, is mandatory only as to the victim's testimony, we do not rule out the possibility that the trial judge might close other parts of the trial. The decision to close any part of the trial other than the victim's testimony or to close the entire trial is a matter within the judge's sound discretion. See *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 546 (1977). Because

the judge's discretion in the context of a criminal trial is well settled, we take this opportunity to provide general guidelines for the exercise of that discretion. See *id.* at 550-552; *Kennedy* v. *District Court of Dukes County*, 356 Mass. 367, 373 (1969). As we understand G. L. c. 278, § 16A, and the common law relating to closure of trials, a judge should hold a hearing before entering an order closing parts of the trial other than the victim's testimony. Although we have not ruled that the plaintiff has a constitutional interest, this view is consistent with the constitutional requirement that a party receive a hearing before suffering a deprivation of such an interest. See *Gannett Co.* v. *DePasquale*, U.S. , - (1979) (Powell, J., concurring);[p] *id.* at (Blackmun, J., dissenting).[q] We take this position because of our expressed view of the significance of society's interest in public trials.

In a case in which G. L. c. 278, § 16A, applies, the Commonwealth may move for closure of parts of the trial other than the victim's testimony or for closure of the entire trial. The issue at the hearing shall be whether such closure is necessary to serve the statutory purpose; i.e., to preserve evidence required for a just conviction. For example, if closing all or part of the trial were necessary to assure the availability of evidence of fresh complaint, see, e.g., *Commonwealth* v. *Gangi*, 243 Mass. 341, 344 (1923); W.B. Leach & P.J. Liacos, Massachusetts Evidence 133 (4th ed. 1967), the judge would be justified in ordering closure. The Commonwealth should bear the burden of showing necessity. Furthermore, because of the policy favoring publicity, an agreement between the prosecution and the defense to close the trial should not justify closure nor even be relevant to the judge's determination of necessity.

At the hearing, any person to be excluded from the trial should have an opportunity to state his objections to the

---

[p] 99 S. Ct. 2898, 2916-2917 (1979).

[q] 99 S. Ct. 2939 (1979).

order.[23] The person need not file a formal motion to intervene. The public need not receive prior notice of the closure hearing. On the other hand, the court should hear a person who in timely fashion informs the court of his desire to object. The hearing should be completed expeditiously and should not ordinarily involve lengthy legal argument. On conclusion of the hearing, the judge should make findings of fact as appropriate and should rule on the necessity for closure.[24]

Since the appeal before us involves an issue now moot, it is to be dismissed.

So ordered.

QUIRICO, J. (dissenting). General Laws c. 278, § 16A, provides in pertinent part as follows: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." It is undisputed that the criminal trial from which employees of the Boston Globe were excluded was one in which the defendant was being tried on indictments charging him with the crimes of forcible rape and forced unnatural rape on victims who were under eighteen years of age.

---

[23] As we held in *Blondin*, *supra*, and *Marshall*, *supra*, the judge may not exclude certain persons with a "direct interest in the case."

[24] Although a judge might abuse his discretion or make an error of law, such an error would not warrant reversal on statutory grounds if raised on appeal by a defendant. Cf. *Commonwealth* v. *Leo*, Mass. , (1979) (Mass. Adv. Sh. [1979] 2245, 2247-2249) (G. L. c. 278, § 16A, does not create rights in a defendant). If a defendant should raise at the hearing a constitutional objection to closure, the judge should consider the extent of his constitutional right to a public trial.

In part 1 of its opinion, the court holds that the word "trial," as used in the phrase "[a]t the trial" at the beginning of § 16A, is ambiguous. The court then discusses several principles of statutory construction as relating to ambiguous language and by the application of those principles to § 16A it concludes that when the Legislature used the word "trial" it intended it to mean only that part of the trial during which the minor victim testifies.

For the reasons stated below, I am unable to agree with that interpretation of § 16A, and I therefore respectfully dissent from the opinion in that regard.

It is clear from the court's opinion that its conclusion that § 16A "is mandatory only as to the victim's testimony" is not based on any holding that the statute is unconstitutional. The court expressly states that it does not reach the constitutional issues raised by the plaintiff. The court limits itself to the process of statutory construction of an assumedly ambiguous statute. For that purpose it resorts to several aids to interpretation, particularly the legislative history of § 16A, as originally enacted in 1923 and amended in 1931, and various articles appearing in law journals and other publications between 1969 and 1978 on the subject of the ordeal of rape victims in court. See note 11 *supra*, of the court's opinion. I likewise limit this dissent to a consideration of statutory construction, and do not reach any constitutional issues.

1. I do not believe that the words "[a]t the trial," as used at the beginning of § 16A, are ambiguous. I believe that they are used in their usual and ordinary sense, and that as such they include all of the trial proceedings starting with the empanelling of the jury and continuing through the return of the verdict or finding. There may be some exceptions thereto, e.g., voir dire hearings held in the absence of the jury to determine the admissibility of evidence, but it is not necessary for the purposes of this case to identify or define such exceptions precisely. In any event I do not believe that the clear language, given its usual and ordinary meaning, permits the drawing of a distinction between that part of the trial during which a youthful victim of a sex

crime testifies and the remainder of the trial during which any other witnesses are testifying.

The language which the Legislature used in § 16A to state its intention to require the exclusion of the general public "at the trial" of persons charged with sex crimes against young victims is not unique to that statute. In G. L. c. 119, § 38, inserted by St. 1954, c. 646, § 1, the Legislature mandated that "[a]ll hearings [of a certain type involving juveniles] shall be closed to the general public. . . ." A similar provision is found in G. L. c. 119, § 65, to the effect that "the court shall exclude the general public from the room" in which hearings are held on certain juvenile matters. General Laws c. 210, § 6, as amended through St. 1971, c. 388, provides that if, at the request of any party, a probate judge determines that an adoption hearing shall be held in chambers, "the probate judge shall exclude the general public from the hearing." Similarly, G. L. c. 278, § 16B, inserted by St. 1949, c. 302, provides that a District Court judge "may exclude the general public from the court room during the trial of any criminal proceeding involving husband and wife." I know of no claim or suggestion that these statutes should be construed to permit the closure of only certain parts of the trials to which they apply; and I know of no instances of the application of such a limitation by our trial courts as a matter of statutory construction.

It is significant to note that when the Legislature did intend to authorize the exclusion of persons from limited portions of a trial it did not use the general language contained in § 16A and other statutes cited above, but rather it chose language expressly authorizing an exclusion limited to prescribed portions of a trial. This is eloquently demonstrated by G. L. c. 278, § 16C, enacted by St. 1978, c. 316, which provides in part: "To protect the parties involved at a trial arising from a complaint or indictment for incest or rape, the trial judge may exclude all spectators from the courtroom in which such trial is being held, or from said courtroom during those portions of such trial when direct testi-

mony is to be presented," provided certain consents by the parties are first obtained.

In my opinion, a comparison of § 16A with the other statutes discussed above requires a conclusion that the Legislature is capable when drafting statutes of using language which clearly expresses its intent to exclude the general public or spectators from trials generally as distinguished from parts of trials, and that it demonstrated this in its choice of the language of § 16A in sharp contrast to that of § 16C. A comparison of those two sections leaves no support for a claim that § 16A is ambiguous as to what is meant by the words "at the trial."

2. If, as I believe, the language of § 16A is not ambiguous, then there is no need or occasion to resort to the legislative history of the statute. While "[i]t is permissible to examine records of legislative proceedings incident to the passage of a statute to illumine its doubtful language . . . its plain meaning cannot be thereby affected . . . ." *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471, 474 (1919). *Old South Ass'n* v. *Boston*, 212 Mass. 299, 304-305 (1912). "The plain meaning of a statute cannot be affected by resort to proceedings incident to its passage. Light may be sought from that source only to illumine statutory language of doubtful import. Other information than that afforded by the words of the statute can be examined only to aid in the solution of an ambiguity. We can only interpret the words of the statute: we cannot speculate as to the probable intention of the Legislature apart from those words." *Allen* v. *Commissioner of Corps. & Taxation*, 272 Mass. 502, 508 (1930).

The case of *D.N. Kelley & Son* v. *Selectmen of Fairhaven*, 294 Mass. 570 (1936), involved the question whether the selectmen were authorized by St. 1926, c. 43, § 1, to give a lease of a town wharf. *Id.* at 571, 574. The plaintiff offered, and the trial judge excluded, evidence that as originally presented to the Governor for signature the bill expressly authorized the selectmen to "lease said property in whole or in part for any purpose," that the Governor returned it with his recommendation that those words be

struck out, and that the bill after having been thus amended was enacted and became a law. *Id.* at 576. The law as enacted said that the selectmen could acquire Union Wharf in their town and that they could "maintain and operate the same as a wharf." *Id.* at 571. This court, in upholding the exclusion of the proffered evidence, said: "The words of the statute as enacted are plain and need no elucidation as to their meaning. The leasing shown by the record and assailed in this proceeding was merely incidental to the main purpose for which the wharf was acquired and in no way has interfered with that purpose." *Id.* at 576 (citation omitted).

In *Milton* v. *Metropolitan Dist. Comm'n*, 342 Mass. 222, 223 (1961), we said: "There is no need to resort to the legislative history of [the statute involved], because its words are unequivocal. Indeed, because of its clarity we should not interpret it by resorting to its legislative history." Accord, *Nichols* v. *Commissioner of Corps. & Taxation*, 314 Mass. 285, 293 (1943); *Boston Consol. Gas Co.* v. *Department of Pub. Utils.*, 321 Mass. 259, 266 (1947).

Since it is my opinion, as already stated above, that the language of § 16A, and particularly the words "at the trial" as used therein, are not ambiguous, I believe that under the doctrine developed in the cases discussed above, nothing in the legislative history can justify a departure from the plain meaning of these words.

In its opinion the court seems to emphasize that the Special Commission which recommended the amendment of § 16A in the manner later enacted as St. 1931, c. 205, said in its report (1931 House Doc. No. 1200 at 90) that the statutory purpose was: "To spare girls of juvenile age the embarrassment, humiliation and demoralization of testifying to all the sordid details of rape, incest, carnal abuse or other crime involving sex, incidental to open trial with examination and cross-examination." At the risk of repetition, it is my view that such emphasis and reliance on the report would be proper if we were dealing with ambiguous statutory language, which I do not believe to be the case. The

Legislature apparently chose language which was broader than that which would have been necessary to accomplish the more limited objective of the Commission. In these circumstances the intention of the Special Commission cannot prevail over the clear and unequivocal, albeit broader, language used by the Legislature in § 16A.

3. If this were a case where, by reason of ambiguous statutory language, we were permitted to resort to extrinsic aids for the interpretation of that language, I would prefer to resort to the aid sanctioned in *Burrage* v. *County of Bristol*, 210 Mass. 299 (1911). That case involved the question whether a statute which authorized "the expenses and costs" of disbarment proceedings meant that such sums were to be paid "as in criminal prosecutions." *Id.* at 300. This court said, *id.* at 301: "It is agreed that the practice has been for many years for the counties to pay for professional services rendered in prosecuting disbarment proceedings. Where the language of a statute is of doubtful import, the contemporaneous construction put upon it by officers thereby charged with performance of public duties is strong evidence of its meaning. The understanding and application of statutory words susceptible of different meanings, through years of practice, and sanctioned by the acquiescence of the Legislature, is significant of the intention with which they were employed originally."[1]

The case of *Swan* v. *Justices of the Superior Court*, 222 Mass. 542 (1916), involved the removal of members of a licensing board under R. L. c. 100, § 4, which provided that such removals were subject to review by the Superior Court

---

[1] In many other cases involving the construction of a statute, this court has used, as an extrinsic aid, the construction given to that statute over a period of years by an administrative agency charged with the enforcement or administration of the statute, sometimes citing the *Burrage* case, *supra*, in support of that practice. See, e.g., *Cleary* v. *Cardullo's Inc.*, 347 Mass. 337, 343-344 (1964); *Mullen* v. *Board of Sewer Comm'rs*, 280 Mass. 531, 536 (1932); *Allen* v. *Commissioner of Corps. & Taxation*, 272 Mass. 502, 509 (1930); *United States Trust Co.* v. *Commonwealth*, 245 Mass. 75, 80 (1923); *Tyler* v. *Treasurer & Receiver Gen.*, 226 Mass. 306, 310 (1917).

and that "there shall be no appeal" from the decision of the court. *Id.* at 543. The issue was whether, notwithstanding the quoted language, the decision could be reviewed under a petition for a writ of certiorari, as had been done for many years, pursuant to R. L. c. 156, § 3, and R. L. c. 192, § 4, authorizing this court "to correct and prevent errors and abuses [in proceedings of trial courts] if no other remedy is expressly provided." In holding that the latter statutes prevailed, this court noted that the Superior Court had universally followed a practice in accord with those statutes, and said, "[t]he understanding and application of statutory words through years of practice by those charged with heavy official responsibility to interpret them aright, sanctioned by the acquiescence of the Legislature, is persuasive, although not conclusive, as to their correct meaning." *Id.* at 547.

If we were to resort to extrinsic aids for the interpretation of G. L. c. 278, § 16A, on the assumption that its language is ambiguous, I believe that the aid illustrated in the *Burrage* and *Swan* cases, *supra*, would support the conclusion that § 16A is not to be interpreted as narrowly as is done in this court's opinion in the present case. The court holds today that since 1931, § 16A became mandatory by reason of the amendment[2] substituting the mandatory word "shall" for the directory word "may." I believe it is proper for us to take judicial notice of the fact that almost all Superior Court judges who have had occasion to apply the statute since 1931 have proceeded on the basis that it required closure of the entire trial. I know of no instance in which a judge who made a more limited application of § 16A did so on the basis of the interpretation this day given to it by this court.

I believe that it is also proper to take notice (a) that in the past several years there has been an increase in aggressive, and perhaps concerted, action by the press in claiming a constitutional right to be present at trials which are subject to § 16A; and (b) that some judges of the Superior Court,

---

[2]St. 1931, c. 205.

but very few, have either yielded to or attempted to accommodate that pressure by admitting the press under special conditions, guidelines or restraints. See *Commonwealth* v. *Leo*, Mass. , - (1979).[a] Whatever the motivation or reason for this departure from the previous universal application of § 16A to the entire trial, there is no indication that it was due to any concept that the Legislature had intended the closure to be limited to the time when the youthful victim testified. Indeed, the departure as applied in the *Leo* case, *supra*, did not take the form of the closure of a particular part of the trial. If the departure was due to constitutional considerations, it does not detract from the significance of the fact that for almost fifty years the judges of the Superior Court have treated § 16A as applying to the entire trial. That fact, while not conclusive, is in my opinion persuasive against the limitation which this court now places on the statute.

4. Although the court does not decide the constitutional issues raised by the plaintiff, their presence is a factor in the limitation which it places on § 16A. The court expressly notes the presence of these issues and says that in view thereof, and of "the United States Supreme Court's uncertain posture on the issues, [citing the *Richmond Newspapers, Inc.*, and the *Gannett Co.* cases] we seek to shrink the region of possible constitutional doubts about G. L. c. 278, § 16A." It does this in the application of the principle that a "statute must be construed, if fairly possible so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

The *Richmond Newspapers, Inc.*, case has not been argued before the United States Supreme Court. In my opinion if the decision in that case or any other decision hereafter by a court enjoying supremacy in this area mandates the truncation of G. L. c. 278, § 16A, so that it applies only to the time when the minor victim testifies, there will be time enough for this court so to limit it. On the other hand,

---

[a] Mass. Adv. Sh. (1979) 2245, 2246-2249.

if it becomes apparent from future controlling decisions that the truncation now declared by this court was not constitutionally required, the present holding probably cannot effectively be reversed except by new legislation.

Until there is a controlling decision on this subject by the United States Supreme Court, I do not believe that the concern expressed and protection provided by the Legislature for minor victims of sex crimes by the language of G. L. c. 278, § 16A, should be stripped from them by judicial action. The mere specter of a decision yet to be issued by the United States Supreme Court should not be a factor contributing to judicial retreat and discontinued enforcement of the legislative mandate contained in § 16A.

Supreme Court of the United States

No. 79-1862

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

SUPERIOR COURT FOR THE COUNTY OF NORFOLK,
APPELLEE.

APPEAL from the Supreme Judicial Court of Massachusetts.

THIS CAUSE having been submitted on the statement of jurisdiction and motion to dismiss.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause be vacated with costs, and that this cause be remanded to the Supreme Judicial Court of Massachusetts for further consideration in light of *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. (1980).

IT IS FURTHER ORDERED that the appellant, Globe Newspaper Company, recover from Superior Court for the County of Norfolk One Hundred Dollars ($100) for its costs herein expended.

October 14, 1980

Clerk's costs: $100.00

United States of America, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges
of the Supreme Judicial
Court of Massachusetts,

GREETINGS:

WHEREAS, lately in the Supreme Judicial Court of Massachusetts, there came before you a cause between Globe Newspaper Company and Superior Court, No. 79-191, wherein the judgment of the said Supreme Judicial Court was duly entered on the twenty-sixth day of February, 1980, as appears by an inspection of the jurisdictional statement from the said Supreme Court,

AND WHEREAS, in the 1980 Term, the said cause having been submitted to the SUPREME COURT OF THE UNITED STATES on the said jurisdictional statement and motion to dismiss,

ON CONSIDERATION WHEREOF, it was ordered and adjudged on October 14, 1980, by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the Supreme Judicial Court of Massachusetts for further consideration in light of *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. (1980).

IT IS FURTHER ORDERED that the appellant, Globe Newspaper Company, recover from the Superior Court for the County of Norfolk One Hundred Dollars ($100) for its costs herein expended.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in con-

formity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and Laws of the United States, the said appeal notwithstanding.

Witness the Honorable WARREN E. BURGER, Chief Justice of the United States, the — fourteenth — day of — November —, in the year of our Lord one thousand nine hundred and eighty.

Costs of Globe Newspaper Company

Clerk's costs: $100

/s/ MICHAEL RODAK, JR.

Clerk of the Supreme Court
of the United States

No. 79-1862

GLOBE NEWSPAPER COMPANY

v.

SUPERIOR COURT FOR THE
COUNTY OF NORFOLK

GLOBE NEWSPAPER CO. *vs.* SUPERIOR COURT.

Suffolk. March 2, 1981. — June 30, 1981.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, & NOLAN, JJ.

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on April 25, 1979.

The case was heard by *Braucher*, J.

After review by the full court and appeal to the Supreme Court of the United States, the case was remanded by that Court for further consideration.

James F. McHugh (*Jane E. Serene* with him) for Globe Newspaper Company.

Mitchell J. Sikora, Jr., Assistant Attorney General (*Alan B. Sherr*, Assistant Attorney General, with him) for the defendant.

James C. Heigham for the Massachusetts Newspaper Publishers Association, amicus curiae, submitted a brief.

LIACOS, J. This case is before us on remand from the United States Supreme Court, *Globe Newspaper Co.* v. *Superior Court*, U.S. (1980).[a] The order of the Supreme Court vacated the judgment in *Globe Newspaper Co.* v. *Superior Court*, Mass. (1980)[b] (*Globe I*). The Court remanded the cause for further consideration by this court in light of *Richmond Newspapers, Inc.* v. *Virginia*, U.S. (1980).[c] In *Richmond Newspapers*, the Supreme Court recognized for the first time that the First Amendment to the United States Constitution guarantees a right of public access to criminal trials. We hold that G. L.

---

[a] 101 S. Ct. 259 (1980).

[b] Mass. Adv. Sh. (1980) 485.

[c] 100 S. Ct. 2814 (1980).

c. 278, § 16A, as construed in *Globe I*, is constitutional under the First Amendment to the Federal Constitution.

The underlying facts of this case are set forth in detail in our original opinion,[1] but for the sake of clarity we provide a brief summary. In mid-April of 1979, preliminary motions were argued in the case of Commonwealth *vs.* Albert Aladjem, Norfolk Superior Court, No. 73102-9. Aladjem was accused of forcible rape and forced unnatural rape. Three complaining witnesses were involved, all minors, two sixteen and one seventeen years of age at the time of trial. The presiding judge ordered the hearings on preliminary motions closed to the public and press, and the prohibition continued throughout the entire trial. A jury verdict of not guilty was delivered on May 10, 1979. The closure order, issued without hearing,[2] was based on the conclusion of the trial judge that G. L. c. 278, § 16A, required such action. The statute in relevant part reads as follows: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case."

Following the action of the Superior Court judge, the plaintiff, Globe Newspaper Company (Globe), sought from a single justice of this court, an order permitting members of the press to attend the trial and related proceedings. G. L. c. 211, § 3. After hearing the parties, the single justice

---

[1] The facts are as stated in the initial petition of the plaintiff. They were not disputed by the defendant and have been accepted as accurate throughout the various proceedings in this case.

[2] The Globe sought to intervene but its request was denied.

denied the relief sought. The Globe appealed to the full court. In that appeal, the Globe raised statutory and constitutional claims. We held that the case was moot, since the criminal trial already had ended in acquittal. We declined, for a number of reasons, to reach the constitutional issues raised by the Globe.[3] Still, recognizing that the issue before us was one capable of repetition yet evading review, the opinion did delineate our view as to the proper interpretation of G. L. c. 278, § 16A. We held that the statute mandated closure only during the testimony of minor complainants. We also indicated that requests to exclude the public from additional segments of a trial were matters to be considered within the sound discretion of the trial judge. We suggested that a judge should consider whether closure was necessary to protect the State's interest in preserving evidence and obtaining just convictions; such a request should be granted only after a hearing where any person to be excluded, including representatives of the press, could be heard.

The Globe now claims that *Richmond Newspapers* dictates a different result. No party contests that there are instances where a minor victim may be psychologically unable to testify if confronted with a large group of spectators or if the minor is aware that what is being said will become a matter of wide public knowledge. But in the plaintiff's view such a determination can be constitutional only if

---

[3]The plaintiff in *Globe Newspaper Co.* v. *Superior Court*, Mass. (1980) (*Globe I*) (Mass. Adv. Sh. [1980] 485), failed to fully brief or argue any claim based on art. 16 of the Declaration of Rights of the Massachusetts Constitution and thus we did not consider this contention. The pendency of a decision in *Richmond Newspapers, Inc.* v. *Virginia*, U.S. (1980) (100 S. Ct. 2814 [1980]), and the uncertainty engendered by *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979), were among the reasons that led us to refrain from reaching the Federal constitutional issues.

made in a case-by-case manner after a hearing has been held at which interested parties (the Commonwealth, the defendant, members of the public, including the press) have presented evidence. The automatic closing of a minor victim's testimony would thus be prohibited. Additionally, the plaintiff challenges the standards set forth in *Globe I* for the closing of other portions of such trials, arguing that adequate weight was not given in this court to the interests of the press and public.

The plaintiff predicates its argument on its own rights under the First Amendment, as applied to the States by the Fourteenth Amendment. See, e.g., *Fiske* v. *Kansas*, 274 U.S. 380 (1927) (freedom of speech); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (freedom of the press); *De-Jonge* v. *Oregon*, 299 U.S. 353 (1937) (freedom of assembly).[4] The Globe also suggests that it should be allowed to assert the Sixth Amendment rights of Aladjem, who was the defendant in the underlying criminal prosecution, and who opposed the closing of the trial to the press and public. Cf. *In re Oliver*, 333 U.S. 257 (1948) (right to public trial). In *Globe I*, we rejected this proposition since the accused, hav-

---

[4] The defendant points out, with some justification, that the only issue technically before us on remand may be whether the plaintiff's claims were indeed moot in the initial proceeding. If the answer is yes, as a matter of Federal constitutional law, there is no need for us to resolve the plaintiff's substantive contentions. Indeed there is some debate over the propriety of a State court resolving a Federal claim in such circumstances. See L. Tribe, American Constitutional Law § 3-18 at 81 (1978). However, both in *Gannett Co.* v. *DePasquale*, *supra*, and *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, the Supreme Court considered claims by news organizations arising from the closing of trials or pretrial sessions in cases that had long since concluded. We pointed out in *Globe I*, *supra* at (Mass. Adv. Sh. [1980] at 486), that the case before us was one "capable of repetition yet evading review," citing *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). In light of these considerations, and of the mandate implicit in the remand of the Supreme Court to this court, we conclude that the case is not moot as to the First Amendment issues.

ing objected to the closure order, chose not to pursue the claim after acquittal. We continue to believe that these personal rights, at least in the context of this case, can only be asserted by the original criminal defendant.[5]

A resolution of the issues raised by the plaintiff requires a close reading of *Richmond Newspapers*. The question facing the Supreme Court was whether the public and press possess a constitutional right to attend criminal trials. *Id.* at [d] (plurality opinion).[6] A trial judge in a small Virginia

---

[5] The plaintiff finds authority for its contention in those decisions of the United States Supreme Court that have allowed a third party to assert the rights of individuals not before the court. See, e.g., *Eisenstadt* v. *Baird*, 405 U.S. 438, 445-446 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965). The weakness of this argument however is that *Griswold* pointed to the existence of a "professional relationship" between the party before the court and the individuals whose rights were asserted. In *Eisenstadt*, a somewhat similar relationship was present as well as a situation where a finding against the party before the court would have significantly impaired the right of the absent parties to later assert their rights. *Id.* at 446. So, too, in cases where third-party standing has been allowed, there generally has not been a single individual whose interests are purportedly being protected but rather some group, if not a certified class. When the absent party, as here, is an identified individual fully competent to protect his rights, there is little reason to allow surrogate standing. See *Gilmore* v. *Utah*, 429 U.S. 1012, 1017 (1976) (Stevens, J., concurring) (order dismissing stay of execution); Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 310-315 (1979).

We note also that the various opinions in *Richmond Newspapers* are based on the First Amendment, not the Sixth Amendment. Hence, we consider the mandate in the remand to require us to consider First Amendment issues only.

[d] 100 S. Ct. at 2818 (1980).

[6] The precise basis of the Supreme Court's decision in *Richmond Newspapers, Inc.* v. *Virginia*, U.S. (1980) (100 S. Ct. 2814 [1980]), is somewhat unclear. It appears the Sixth Amendment right to a public trial was not relied upon (see note 5 *supra*), and that the essential underpinnings of the decision are found in the First Amendment. The difficulties of interpretation are expressed by Justice Blackmun, concurring in the judgment: "The Court, however, has eschewed the Sixth Amendment route. The plurality turns to other possible constitutional sources and invokes a veritable potpourri of them — the speech clause of the First

community had excluded both press and public from the third retrial of a murder case. The closing, on motion by the defense attorney and without objection from the prosecution, was ordered without a hearing on the basis of a statute that placed discretionary authority in the hands of the judge.[7]

The Chief Justice and six Justices agreed that the decision to close was improper. Although there was no majority opinion,[8] two themes were stressed by all. The unbroken common law history of open trials was central in the plurality opinion of Chief Justice Burger, joined by Justices White and Stevens. *Id.* at - .[e] While such a tradition alone does not create a constitutional right in the public and press to attend trials, it was viewed by these Justices in conjunction with the First Amendment's "core purpose of assuring freedom of communication on matters relating to the functioning of government." *Id.* at .[f] The Chief Justice

---

Amendment, the press clause, the assembly clause, the Ninth Amendment, and a cluster of penumbral guarantees recognized in past decisions. This course is troublesome, but it is the route that has been selected and, at least for now, we must live with it. No purpose would be served by my spelling out at length here the reasons for my saying that the course is troublesome. I need do no more than observe that uncertainty marks the nature — and strictness — of the standard of closure the Court adopts." *Id.* at (100 S. Ct. at 2842 [1980]).

[7] The plurality considered the challenge to be aimed at the manner in which the trial judge exercised his discretion rather than at the statute itself (Va. Code § 19.2-266 [1975]). *Id.* at n.4 (100 S. Ct. at 2820 n.4 [1980]). Justice Brennan, joined by Justice Marshall, would have held the statute itself unconstitutional since it conferred unfettered discretion. *Id.* at (100 S. Ct. at 2839 [1980]).

[8] There is some difficulty in determining the binding rule of law in a decision which lacks reasoning to which a majority of the Court has agreed. See Note, Plurality Decisions and Judicial Decisionmaking, 94 Harv. L. Rev. 1127 (1981); Note, The Precedential Valve of Supreme Court Plurality Decisions, 80 Colum. L. Rev. 756 (1980).

[e] 100 S. Ct. at 2821-2826 (1980).

[f] 100 S. Ct. at 2827 (1980).

found it "difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Id.* The plurality opinion describes an open court room as akin to a public forum protected by freedom of assembly, *id.* at ,[g] and as a critical source of information about the functioning of government, *id.* at .[h] This concern with the history of unimpeded access was shared by Justice Blackmun, although he would have found the locus of the public right in the open trial provisions of the Sixth Amendment. *Id.* at - .[i] Justice Stewart also adopted the historical analysis, emphasizing in particular the concept of the public forum. *Id.* at .[j]

Justice Brennan, joined by Justice Marshall, accepted the importance of tradition, *id.* at - ,[k] but placed more emphasis on the structural role of the First Amendment in ensuring public access to information necessary for self-government. *Id.* at - .[l] Justice Stevens shared this position in a separate concurrence, expressing the belief that the major significance of the decision was that the First Amendment was now recognized as creating some affirmative right of access to information in the hands of the government. *Id.* at .[m]

All the members of the Court voting for reversal[9] indicated that there were circumstances where the closing of

---

[g] 100 S. Ct. at 2828 (1980).

[h] 100 S. Ct. at 2827 (1980).

[i] 100 S. Ct. at 2841-2842 (1980).

[j] 100 S. Ct. at 2840 (1980).

[k] 100 S. Ct. at 2834-2835 (1980).

[l] 100 S. Ct. at 2837-2839 (1980).

[m] 100 S. Ct. at 2831 (1980).

[9] Justice Powell took no part in the Court's decision. Justice Rehnquist dissented.

portions of a trial would be justified. Less clear are the particular instances. There is also little direction about the level of opposing interests necessary to exclude the press and public. The Globe points to a passage in the plurality opinion, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public," *id.* at . [n] However, attached to that statement is a footnote in which the plurality disavows any attempt to define the exact circumstances in which trials may be closed. [10]

Justice Brennan's concurrence cautions that a right to governmental information is not absolute but rather subject to "a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality," *id.* at . [o] Justice Stewart specifically pointed to the "sensibilities of a youthful prosecution witness" in a rape

---

[n] 100 S. Ct. at 2830 (1980).

[10] See *Richmond Newspapers*, *supra* at n.18 (100 S. Ct. at 2830 n.18 [1980]). The footnote acknowledges that some situations have in the past been seen as justifying the closing of a trial. The Court referred to 6 J. Wigmore, Evidence § 1835 (Chadbourn rev. 1976), and stated that the Court's holding "does not mean that the First Amendment rights of the public and representatives of the press are absolute." Justices Brennan and Marshall, concurring, also recognized that "countervailing interests" might be sufficient to reverse the presumption favoring open trials. *Id.* at & n.24 (100 S. Ct. at 2839 & n.24 [1980]). That the First Amendment is not an absolute bar to closure was also recognized by Justice Stewart, concurring, *id.* at - & n.5 (100 S. Ct. at 2840-2841 & n.5 [1980]). Cf. *id.* at (Rehnquist, J., dissenting) (100 S. Ct. at 2843 [1980]). It seems significant to us that Wigmore states in § 1835 that: "The danger of overcrowding, the risk of violence or brawls, the moral harm of satisfying pruriency in trials of certain crimes — these are the ordinary grounds for exclusion. It cannot be doubted that such exceptions are within the judicial power to allow.

"By statute in most states they are expressly sanctioned, either in general terms, or for *special classes of cases*, such as divorce, rape, and the like, or for *special classes of persons*, such as minors" (emphasis in original). J. Wigmore, *supra* at 443-445.

[o] 100 S. Ct. at 2833 (1980).

case as an example of a circumstance which might justify the exclusion of the general public. *Id.* at - n.5.[p]

To test the mandatory closing requirement of G. L. c. 278, § 16A, against the standard of *Richmond Newspapers* requires a threefold inquiry: (1) Does the closing of the testimony of the minor victim of a sexual assault[11] violate the same tradition of open proceedings as the closing of an entire murder trial; (2) to what extent does the restriction impede the flow of information necessary to the functioning of democratic institutions; (3) are there substantial State interests underlying the statute, and if there are, can they be furthered by more tightly drawn regulations that will intrude to a lesser degree on the constitutionally protected interests of the press and public?

As already discussed, the constitutional right of access to trials arises in part from an unbroken tradition of openness. See *Globe I, supra* at - .[q] The thrust of the separate opinions in *Richmond Newspapers* is not that the ability or inability of a judge to close a proceeding in 1791 was enshrined unchanging in the Constitution. Rather the vital role of public proceedings in providing information about the operation of government, with a corresponding right to this "public forum," has developed over time. This tradition of open trials long has been a part of the common law of this Commonwealth, and we took cognizance of it in *Globe I.* There is at least one notable exception to this history. In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult. See, e.g., *United States ex rel.*

---

[p] 100 S. Ct. at 2840-2841 n.5 (1980).

[11] We consider here only the crimes within the scope of G. L. c. 278, § 16A, involved in the trial of Aladjem.

[q] Mass. Adv. Sh. (1980) at 494-496.

Latimore v. *Sielaff*, 561 F.2d 691 passim (7th Cir. 1977), cert. denied, 434 U.S. 1076 (1978) (court closed to the public during testimony of twenty-one year old rape victim [press allowed to remain]); *Harris* v. *Stephens*, 361 F.2d 888, 891 (8th Cir. 1966), cert. denied sub nom. *Harris* v. *Bishop*, 386 U.S. 964 (1967) (closing of rape trial to the public during testimony of twenty-three year old victim); *Benedict* v. *People*, 23 Colo. 126, 128-129 (1896) (in a trial for sodomy, judge properly excluded the general public); *Douglas* v. *State*, 328 So. 2d 18, 20-21 (Fla.), cert. denied, 429 U.S. 871 (1976) (court closed to general public during witness's testimony concerning forced sex acts [press allowed to remain]); *State* v. *Callahan*, 100 Minn. 63, 69 (1907) (upholding clearing of court room of spectators when rape victim found it difficult to testify in front of a large crowd); *Price* v. *State*, 496 S.W.2d 103, 107-108 (Tex. Crim. App. 1973) (court cleared during testimony of rape victim [representative of press allowed to remain]). But see, e.g., *Tanksley* v. *United States*, 145 F.2d 58 (9th Cir. 1944) (reversing trial court decision barring public [but not the press] from an entire trial involving a nineteen year old rape victim); *People* v. *Byrnes*, 84 Cal. App. 2d 72, cert. denied, 335 U.S. 847 (1948) (reversing conviction of rape when public was excluded from entire trial); *State* v. *Schmit*, 273 Minn. 78 (1966).

To the extent such closings were justified as an attempt to protect the public from offensive information, see *Douglas* v. *State*, *supra*, such rulings can hardly survive the rationale of *Richmond Newspapers*. More typically, however, the motivation has been overcoming the difficulty the victim may have in publicly testifying about the details of crimes which are, short of homicide, the "ultimate violation of self." *Coker* v. *Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion). Accord, *State* v. *Callahan*, *supra*; *Price* v. *State*,

supra. A part of this willingness to close testimony of the victim of a sexual assault is for the "protection of the personal dignity of the complaining witness." *United States ex rel. Latimore* v. *Sielaff, supra* at 694.

Historically there has been a recognition that significant interests are at stake in a trial involving a sexual assault, interests that may outweigh the public's right to unfettered access to the trial.[12] Disputes have concerned the extent of closings or the justification in a particular fact situation. See *id.* at 694-696. Whatever the disagreement among the courts about specific closure orders, it is clear that the majority of the courts have upheld decisions to close parts of trials when a minor victim of a sexual assault is testifying. *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 388 n.19 (1979). *Geise* v. *United States*, 262 F.2d 151 (9th Cir. 1958), cert. denied, 361 U.S. 842 (1959). *Hogan* v. *State*, 191 Ark. 437 (1935). *State* v. *Nyhus*, 19 N.D. 326 (1909). But see *Lexington Herald Leader Co.* v. *Tackett*, 601 S.W.2d 905 (Ky. 1980). While this tradition alone does not answer the plaintiff's claim, it shows widespread recognition that legitimate and significant interests in closing at least portions of trials for sexual assaults do exist.

General Laws c. 278, § 16A, as interpreted in *Globe I*, limits immediate public observance of a particular kind of testimony. The court room testimony of minors who are the victims of sexual assault cannot be subject to contemporary reporting by members of the press. When the victim is an adult the trial is not automatically closed.[13] The

---

[12] The multitude of jurisdictions which specifically authorize courts to close proceedings involving sexual assaults strengthens this perception. See, e.g., Ala. Code tit. 12, § 12-21-202 (1975); N.Y. Jud. Law § 4 (McKinney) (1975); N.C. Gen. Stat. § 15-166 (1975).

[13] General Laws c. 278, § 16C, authorizes the exclusion of the general public from trials involving incest or rape, even when the victim is an adult. We need not here pass on the particular applications of that

public will therefore be able generally to observe the judicial system dealing with charges involving sexual assault. The Legislature has chosen, however, to treat the testimony of minors in a different way by requiring closure of the trial at the time the minor testifies.[14] The question we must resolve is whether the genuine State interests furthered by the statute justify this impact on First Amendment interests. In *Globe I* we identified the State interests furthered by G. L. c. 278, § 16A, to be, (a) to encourage minor victims to come forward to institute complaints and give testimony (*id.* at [r]); (b) to protect minor victims of certain sex crimes from public degradation, humiliation, demoralization, and psychological damage (*id.* at - [s]); (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment (*id.* at [t]); (d) to promote the sound and orderly administration of justice (*id.* at [u]); (e) to preserve evidence and obtain just convictions (*id.* at , [v]).

The plaintiff does not deny that significant State interests may warrant closure of a trial; it argues, however, that such interests cannot be furthered by legislative mandate. The

---

statute except to point out that it is discretionary, and we expect that trial judges will interpret it in light of *Globe I*, this opinion, and *Richmond Newspapers*.

[14] We note that G. L. c. 278, § 16A, is silent as to the question of transcripts of such testimony being made available to the press; nor did we discuss this question in *Globe I*. We need not resolve that issue here, but leave the question to the sound discretion of trial judges in light of our discussion in *Globe I* and this opinion, and, of course, in light of *Richmond Newspapers*.

[r] Mass. Adv. Sh. (1980) at 496.

[s] Mass. Adv. Sh. (1980) at 496-498.

[t] Mass. Adv. Sh. (1980) at 499.

[u] Mass. Adv. Sh. (1980) at 500.

[v] Mass. Adv. Sh. (1980) at 500, 503.

plaintiff says that a balancing of State interests against First Amendment rights is permissible only if undertaken on a case-by-case basis. We do not agree. We perceive no such holding in *Richmond Newspapers*. We believe that the Legislature, a coordinate branch of government, has power to act. We note additionally that, by their very nature, these substantial State interests would be defeated if a case-by-case determination were used. Ascertaining the susceptibility of an individual victim might require expert testimony and would be a cumbersome process at best. Only the most exceptional minor would be sanguine about the possibility that the details of an attack may become public. An examiner would have to distinguish between natural hesitancy and cases of particular vulnerability. To the extent that such a hearing is effective, requiring various psychological examinations in some depth, the victim will be forced to relive the experience.[15] So, too, the families of youthful victims will be uncertain whether the reporting of a sexual assault will expose a child to additional trauma caused by the preliminary hearing as well as to public testimony at the trial. Implicit also in the Globe's argument is that a State Legislature is without power to act to protect

---

[15]The plaintiff's suggestion at oral argument that a case-by-case approach to determine psychological vulnerability would require press participation in the resolution of this question makes the point more dramatic. As envisioned by the plaintiff, the press should be allowed to participate and to present evidence. To adopt such a view would lead not only to a side trial in addition to the criminal trial, but a trial in which the victim would be the focus of conflicting psychiatric testimony and perhaps examination and cross-examination. We can perceive no procedure more damaging to the well-being of the child; nor one better designed to inhibit criminal complaints and convictions in such cases. For the same reasons, a waiver provision would be inappropriate. To determine whether the witness's decision to testify in public was knowing would require the same kind of potentially damaging inquiry. See *Globe I, supra* at n.21 (Mass. Adv. Sh. [1980] at 500 n.21), for additional reasons which make a theory of waiver inappropriate.

substantial State interests in the context of such trials. We do not believe *Richmond Newspapers* goes that far (see note 7 *supra*) and we are not disposed to reach such a conclusion.

Next, the plaintiff contends that even if legitimate ends are in part served by G. L. c. 278, § 16A, the statute is "underinclusive" and hence must fall. Cf. *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 104-105 (1979); *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 214-215 (1975). It is true that an attempt possibly could be made to give more complete protection to minor victims of sexual assaults. The statute as it stands is only a partial solution since the names of the victims are not part of a closed record. However, G. L. c. 278, § 16A, is aimed at balancing the defendant's Sixth Amendment rights, see generally *Commonwealth* v. *Marshall*, 356 Mass. 432, 435 (1969), and the public's right to know under the First Amendment, against the minor victim's right to minimal harm in the process of testifying, and the Commonwealth's substantial interests as outlined herein. In this light, the statute cannot be said to be fatally underinclusive.

An additional factor that supports the challenged closing is the specific State interest in protecting minors. As we pointed out in *Globe I*, *supra* at [w] "This legislative history reveals that G. L. c. 278, § 16A, stands at the nexus of two overlapping strands of policy; the Legislature wished to shield certain victims of sex crimes from the difficult experience of testifying in public; and the Legislature joined this solicitude for victims with the broad, paternal protection afforded children generally" (footnotes omitted). This well-established State interest does not overwhelm all other constitutional concerns. There is no doubt that once a news organization legitimately obtains information concerning a

---

[w] Mass. Adv. Sh. (1980) at 497.

substantial State interests in the context of such trials. We do not believe *Richmond Newspapers* goes that far (see note 7 *supra*) and we are not disposed to reach such a conclusion.

Next, the plaintiff contends that even if legitimate ends are in part served by G. L. c. 278, § 16A, the statute is "underinclusive" and hence must fall. Cf. *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 104-105 (1979); *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 214-215 (1975). It is true that an attempt possibly could be made to give more complete protection to minor victims of sexual assaults. The statute as it stands is only a partial solution since the names of the victims are not part of a closed record. However, G. L. c. 278, § 16A, is aimed at balancing the defendant's Sixth Amendment rights, see generally *Commonwealth* v. *Marshall*, 356 Mass. 432, 435 (1969), and the public's right to know under the First Amendment, against the minor victim's right to minimal harm in the process of testifying, and the Commonwealth's substantial interests as outlined herein. In this light, the statute cannot be said to be fatally underinclusive.

An additional factor that supports the challenged closing is the specific State interest in protecting minors. As we pointed out in *Globe I*, *supra* at [w] "This legislative history reveals that G. L. c. 278, § 16A, stands at the nexus of two overlapping strands of policy; the Legislature wished to shield certain victims of sex crimes from the difficult experience of testifying in public; and the Legislature joined this solicitude for victims with the broad, paternal protection afforded children generally" (footnotes omitted). This well-established State interest does not overwhelm all other constitutional concerns. There is no doubt that once a news organization legitimately obtains information concerning a

---

[w] Mass. Adv. Sh. (1980) at 497.

juvenile offender or victim, the State may not penalize the publication of such information. *Smith* v. *Daily Mail Publishing Co.*, *supra* at 104. *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977). *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 495 (1975). Similarly, by virtue of the Sixth Amendment, a defendant cannot be prevented from confronting a witness with prior offenses merely because the adjudication of guilt occurred in a juvenile proceeding. *Davis* v. *Alaska*, 415 U.S. 308, 319 (1974). Yet in both the juvenile justice system and in the Commonwealth's dealings with the problem of neglected or abused children there is a clear recognition that the State may act in a manner that otherwise would be forbidden because of a special solicitousness for the interests of minors. See, e.g., *Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption*, Mass. , (1981);[x] *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 545-549 (1971) (plurality opinion). We are given no authority indicating that a State may not close juvenile delinquency proceedings to protect allegedly delinquent juveniles from stigmatization and to further State interests in the rehabilitation of juveniles.[16] General Laws c. 278, § 16A, must be viewed as part of the same scheme. *Globe I*, *supra* at .[y] It would be anomalous indeed if a State Legislature could protect juvenile offenders by closed hearings but was deemed to lack the power to protect juvenile victims of crime. We do not believe that *Richmond Newspapers* dictates such an anomalous result.

The statute, as it affects the testimony of minor victims, is fairly characterized as an attempt to reduce possible harm

---

[x] Mass. Adv. Sh. (1981) 1157, 1172.

[16] See statute and authorities cited in *Globe I*, *supra* at n.10 (Mass. Adv. Sh. [1980] at 497 n.10).

[y] Mass. Adv. Sh. (1980) at 497.

to a vulnerable group of individuals. Both precedent and empirical research support the Commonwealth's position that this concern is genuine and well-founded. *Globe I, supra* at - .[z] Logic and history indicate that the method chosen by the State will further this goal, while making increased reporting of sexual assaults more likely.

Balanced against this must be the impact that the closing of this testimony has on the public's knowledge about these trials. Although there is some temporary diminution of information, we cannot say that *Richmond Newspapers* requires the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims.

The plaintiff also challenges the standards set forth in *Globe I* for the closing of additional portions of a trial involving a sexual assault on a minor victim. We required that a hearing be held at which all interested parties could appear. *Globe I, supra* at - .[aa] Certainly a trial judge in such a hearing is now obliged to recognize the constitutional right of the press and public to attend trials. The justification for such exclusion must comply with the standards of *Richmond Newspapers*. We decline, however, at this point, to go further in articulating the requirements of the First Amendment. Our opinion in *Globe I* made clear that the closing of the entire trial in this instance was improper since no hearing was conducted. Having made such a determination on the basis of the statute, there is no need to reach additional, constitutional issues. See *Fazio* v. *Fazio*, 375 Mass. 394, 405 (1978); *Commonwealth* v. *Bartlett*, 374 Mass. 744, 748-749 (1978).

---

[z] Mass. Adv. Sh. (1980) at 497-500.

[aa] Mass. Adv. Sh. (1980) at 504-505.

Accordingly, we conclude that the opinion of this court in *Globe I* is valid, and we dismiss the appeal before us.

So ordered.

WILKINS, J. (concurring). I agree with most of what the court has said. *Richmond Newspapers, Inc.* v. *Virginia*, U.S. (1980),[a] did not involve the closing of a trial, or a portion of a trial, which involved a minor victim of a sex crime. Various Justices noted that the right to a public trial was not absolute, recognizing that overriding or countervailing interests might overcome the general principle that a criminal trial must be open to the public.[1] We have no guidance yet on whether the mandatory closing of all criminal trials during the testimony of minor victims of sex crimes is permissible under the First Amendment. Justice Stewart recognized that "the sensibilities of a youthful prosecution witness, for example, might justify similar exclusion [at least from some segments of a trial] in a criminal trial for rape, so long as the defendant's Sixth Amendment right to a public trial were not impaired." *Id.* at - n.5.[b]

I am not certain that the mandatory closing of the trial of a case involving a minor victim of a sex crime during his or her testimony, as the court directs, is constitutionally permissible without specific findings by the judge that the clos-

---

[a] 100 S. Ct. 2814 (1980).

[1] See *Richmond Newspapers, Inc.* v. *Virginia*, U.S. (1980) (Chief Justice Burger, joined by Justice White and Justice Stevens) (100 S. Ct. 2814, 2830 [1980]); *id.* at (Justice Brennan, concurring, joined by Justice Marshall) (100 S. Ct. at 2839 [1980]); *id.* at - n.5 (Justice Stewart, concurring) (100 S. Ct. at 2840-2841 n.5 [1980]).

[b] 100 S. Ct. at 2840-2841 n.5 (1980).

ing is justified by overriding or countervailing interests of the Commonwealth. I question whether the findings, imputed to the Legislature, in support of closing such trials can alone justify closing a portion of all such trials. The applicability of these imputed legislative findings in each case is not assured. If, for example, the minor victim did not object to the trial being public during his or her testimony and the defendant wanted the entire trial to be public, or, to make the case perhaps even stronger, if the minor victim wanted the public to know precisely what a heinous crime the defendant had committed, the imputed legislative justifications for requiring the closing of the trial during the victim's testimony would in part, at least, be inapplicable. In such a case, the reasons for closing a portion of the trial would be far less persuasive than in a case in which the victim wanted the trial closed during his or her testimony. I would require specific findings in each case before a trial may be closed during the testimony of a minor victim of a sex crime and would not foreclose the trial judge from concluding, on proper findings, that a trial should be entirely public.

SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

CIVIL NO. 1825

GLOBE NEWSPAPER COMPANY,
APPELLANT

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE

Notice of Appeal to The Supreme Court of the United States

Notice is hereby given that Globe Newspaper Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts of June 30, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

JAMES F. MCHUGH
MARC A. REARDON
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300
Counsel for Appellant

Date: September 22, 1981

Certificate of Service

I, James F. McHugh, counsel for appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance with Rule 28 of the Rules of the United States Supreme Court, by mailing a copy thereof, first-class postage prepaid, to Mitchell J. Sikora, Jr., 2019 McCormack Building, Boston, MA 02108, Assistant Attorney General for the Commonwealth of Massachusetts, attorney for appellee. All parties required to be served have been served.

JAMES F. MCHUGH
BINGHAM, DANA & GOULD
100 Federal Street
Boston, MA 02110
(617) 357-9300

Date: September 22, 1981

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
CIVIL ACTION
No. 79-191

GLOBE NEWSPAPER COMPANY,
APPELLANT

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE

Notice of Appeal to The Supreme Court of the United States

Notice is hereby given that Globe Newspaper Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts of June 30, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

JAMES F. MCHUGH
MARC A. REARDON
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300
Counsel for Appellant

Date: September 22, 1981

Certificate of Service

I, James F. McHugh, counsel for appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance with Rule 28 of the Rules of the United States Supreme Court, by mailing a copy thereof, first-class postage prepaid, to Mitchell J. Sikora, Jr., 2019 McCormack Building, Boston, MA 02108, Assistant Attorney General for the Commonwealth of Massachusetts, attorney for appellee. All parties required to be served have been served.

JAMES F. MCHUGH
BINGHAM, DANA & GOULD
100 Federal Street
Boston, MA 02110
(617) 357-9300

Date: September 22, 1981

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPREME JUDICIAL COURT
CRIMINAL ACTION
No. 73102-9

GLOBE NEWSPAPER COMPANY,
APPELLANT

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE

Notice of Appeal to The Supreme Court of the United States

Notice is hereby given that Globe Newspaper Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts of June 30, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

JAMES F. MCHUGH
MARC A. REARDON
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300
Counsel for Appellant

Date: September 22, 1981

Certificate of Service

I, James F. McHugh, counsel for appellants, hereby certify that I have this day served a copy of the foregoing Notice of Appeal, in compliance with Rule 28 of the Rules of the United States Supreme Court, by mailing a copy thereof, first-class postage prepaid, to Mitchell J. Sikora, Jr., 2019 McCormack Building, Boston, MA 02108, Assistant Attorney General for the Commonwealth of Massachusetts, attorney for appellee. All parties required to be served have been served.

JAMES F. MCHUGH
BINGHAM, DANA & GOULD
100 Federal Street
Boston, MA 02110
(617) 357-9300

Date: September 22, 1981

Joint Appendix

Office-Supreme Court, U.S.
FILED
JAN 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-611

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

JOINT APPENDIX

JAMES F. McHUGH
MARC A. REARDON
JANE E. SERENE
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300

Counsel for Appellant

FRANCIS X. BELLOTTI
MITCHELL J. SIKORA, JR.
GERALD J. CARUSO
OFFICE OF THE
ATTORNEY GENERAL
One Ashburton Place
Boston, Massachusetts 02108.
(617) 727-1032

Counsel for Appellee

APPEAL DOCKETED SEPTEMBER 28, 1981
PROBABLE JURISDICTION NOTED NOVEMBER 16, 1981.

Table of Contents.

Docket entries in the Supreme Judicial Court for the Commonwealth of Massachusetts 1a

Docket entries in the Supreme Judicial Court for the County of Suffolk 6a

Petition for extraordinary relief pursuant to Massachusetts General Laws, chapter 211, section 3 8a

Exhibit A — motion to revoke orders concerning exclusion of the press 12a

Exhibit B — motion for hearing 13a

Exhibit C — motion to intervene 14a

Exhibit D — transcript of hearing on motions 15a

Transcript of the hearing held on April 26, 1979 before a single justice of the Supreme Judicial Court 19a

Order of the Supreme Judicial Court for the County of Suffolk 43a

Judgment of the Supreme Judicial Court for the County of Suffolk 44a

Motion to supplement record on appeal 45a

Supplemental statement to record on appeal 46a

Exhibit A — stenographic transcript of lobby conference held on April 30, 1979 in the case of *Commonwealth* v. *Aladjem* 48a

Exhibit B — articles appearing in the *Quincy Patriot Ledger* newspaper on May 11 and 12, 1979 49a

Judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts in *Globe Newspaper Company* v. *The Superior Court for the County of Norfolk (Globe I)* 58a

Opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts in *Globe Newspaper*

Company v. *The Superior Court for the County of Norfolk (Globe I)* 59a

Order of remand from the Supreme Court of the United States 88a

Judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts in *Globe Newspaper Company* v. *The Superior Court for the County of Norfolk (Globe II)* 89a

Opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts in *Globe Newspaper Company* v. *The Superior Court for the County of Norfolk (Globe II)* 90a

Notices of appeal to the Supreme Court of the United States 108a

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court
for the Commonwealth of Massachusetts

Civil No. 1825

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR
THE COUNTY OF NORFOLK,
APPELLEE.

A.C. — Direct Entry
Trial Court: Supreme Judicial Court for Suffolk County
No.: 79-191 CIV
Nature of Case: Petition for Relief — c.211, §3
Appeal By: Plaintiff
Exh.:
Returned
Trans.
Argued: October 9, 1979 (Quorum: W, Q, CJ, K, L)
Decided: February 26, 1980
Second Oral Argument (on remand from U.S. Supreme Court):
March 2, 1981 (Quorum: H, W, L, A, N)
Decided: June 30, 1981

DOCKET ENTRIES

1979	Filings — Proceedings
June 4	Entered.
June 12	Motion of Massachusetts Newspaper Publishers Association for Leave to File Brief as Amicus Curiae, filed by James C. Heigham of Choate, Hall & Stewart, 60 State Street, Boston 02109, Tel. 227-5020. ALLOWED (due July 16, 1979).
June 25	Motion for Leave to File Brief as Amicus Curiae (by Greenfield Recorder). ALLOWED.
July 16	Service of Amicus Curiae, Greenfield Recorder, filed by Marguerite M. Dolan, 36 Second Street, Turners Falls, Mass. 01376 (413) 863-9557.
July 23	Service of Brief for Appellant filed by Janis M. Berry, Bingham, Dana & Gould, 100 Federal Street, Boston 02110 357-9300.
July 11	Motion of Plaintiff/Appellant to Supplement Record on Appeal. ALLOWED.
Aug. 20	Motion of Defendant/Appellee to extend time for filing brief to September 7, 1979. ALLOWED.
Sept. 17	Service of Brief for the Appellee filed by Mitchell J. Sikora, Jr., Assistant Attorney General and Alan B. Sherr, Assistant Attorney General, 2019 McCormack Bldg. Boston 02108 (727-1032)
Sept. 28	Service of Reply Brief for Plaintiff/Appellant by Bingham, Dana & Gould (James F. McHugh, Janis M. Berry,, 100 Federal Street, Boston 02110, Tel: 357-9300.
Oct. 2	Receipt of Amicus Curiae Brief by Ralph E. Gordon, Sr., pro se, Bureau Chief, Greenfield Bureau,

Springfield Newspapers, 28 Federal Street, Greenfield 01301, Tel: (413) 772-6506 or (413) 772-6010.

Oct. 12 Motion by Ralph Gordon to file amicus brief allowed. Notice sent to all parties.

Dec. 6 Motion of Thomas G. Simons, D.A. for the Northwestern District, for Leave to File Memorandum of Amicus Curiae Late; and

Service of Memorandum of Amicus Curiae District Attorney for the Northwestern District, by Thomas G. Simons, D.A. and Stephen R. Kaplan, A.D.A., 15 Gothic Street, Northampton 01060, Tel: (413) 584-2175.

Dec. 17 Opposition to Motion for Leave to File Brief Amicus Curiae filed by James F. McHugh and Janis M. Berry of Bingham, Dana & Gould, 100 Federal Street, Boston 02110 (357-9300).

Dec. 21 Referred to Single Justice: Motion of Thomas G. Simons, District Attorney for the Northwestern District, for Leave to File Memorandum of Amicus Curiae Late; and Memorandum of Amicus Curiae District Attorney for the Northwestern District by Thomas G. Simons, DA; and Opposition to Motion for Leave to File Brief Amicus Curiae. Notice sent to all counsel and Amicus.

1980 Filings — Proceedings

Jan. 4 Order of the Single Justice, (Quirico, J.) denying the Motion of Thomas G. Simons, District Attorney for the Northwestern District for Leave to File Memorandum of Amicus Curiae Late.

Feb. 6 Order waiving 120 day rule. Notice sent to counsel.

1980	Filings — Proceedings
Feb. 26	Appeal dismissed in accordance with the opinion. Rescript Feb. 26. Reasons as on file. Notice to counsel.
May 5	Notice of Appeal to the Supreme Court of the United States filed by James McHugh and Amy B. Cohen of Bingham, Dana & Gould, 100 Federal St., Boston 02110 (357-9300).
Nov. 19	Mandate of the Supreme Court of the United States as on file.

1981	Filings — Proceedings
Jan. 21	Motion of Massachusetts Newspaper Publishers Association For Leave To File Brief As Amicus Curiae filed by James C. Heigham of Choate, Hall & Stewart.
Jan. 21	Service of Brief for Amicus Curiae Massachusetts Newspapers Publishers Association filed by James C. Heigham of Choate, Hall & Stewart, 60 State St., Boston 02109 (227-5020).
Jan. 21	Service of Brief for the Appellant filed by James F. McHugh and Jane E. Serene of Bingham, Dana and Gould, 100 Federal St., Boston 02110 (357-9300).
Jan. 23	Service of Brief for the Appellee filed by Mitchell J. Sikora and Alan B. Sherr of the Attorney General's Office, 2019 McCormack Building, Boston 02108 727-1032.
Jan. 30	Service of Reply Brief for Appellee by Mitchell J. Sikora and Alan B. Sherr of the Attorney General's

Office, 2019 McCormack Building, Boston 02108 727-1032.

Feb. 3 Service of Reply Brief for Appellant by James F. McHugh and Jane Serene of Bingham, Dana & Gould, 100 Federal Street, Boston, MA 02110, Tel: 357-9300.

June 30 Appeal Dismissed.
Rescript June 30.
Reasons as on file.
Notice to Counsel.

Sept. 22 Notice of Appeal to The Supreme Court of the United States by Bingham, Dana & Gould (James F. McHugh and Marc A. Reardon), counsel for Appellant. (Circulated to Quorum.)

Nov. 18 Order of the Supreme Court of the U.S. noting probable jurisdiction in the above-entitled case. (81-611).

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Supreme Judicial Court
No. 79-191 CIVIL

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR
THE COUNTY OF NORFOLK,
APPELLEE.

DOCKET ENTRIES

1979	Filings — Proceedings
April 25	Petition for extraordinary relief pursuant to Mass. General Laws Chapter 211, §3 filed.
April 25	Affidavit of notice filed.
April 26	Appearance of Charles J. Hely, Asst. District Attorney for Norfolk County, 618 High St., Dedham, for the Commonwealth, filed.
April 26	Hearing held.
April 26	Order of Court denying petition, as on file.
May 7	Judgment, as on file.
May 17	Notice of Appeal filed.

1979	Filings — Proceedings
May 21	Correction of date in mailing of notice of appeal filed.
May 25	Notice of assembly of record on appeal sent to Janis M. Berry, James F. McHugh, Esqrs., attorneys for the plaintiff, Margot Botsford, Asst. Attorney General, Ruth McNiff, Asst. District Attorney, Harvey R. Peters, Esq., attorneys for the defendants by a letter dated and mailed this day.

1980	Filings — Proceedings
May 27	Notice of Appeal to the Supreme Court of the United States filed.
May 29	"Appeal dismissed in accordance with the opinion" — per rescript as on file
May 29	Affidavit of Amy B. Cohen, filed.

1981	Filings — Proceedings
July 30	"Appeal dismissed" . . . per rescript as on file.
Sept. 22	Notice of Appeal to the Supreme Court of the United States filed.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
SUFFOLK, SS.

THE GLOBE NEWSPAPER COMPANY

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK.

Petition for Extraordinary Relief Pursuant to Mass. General Laws Chapter 211, Section 3

Now comes plaintiff, The Globe Newspaper Company, (the "plaintiff") and respectfully represents:

1. Plaintiff is a corporation organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts with a principal place of business in Boston, Massachusetts. It is the publisher of The Boston Globe, a newspaper of general circulation in the City of Boston and elsewhere.

2. Defendant, The Superior Court for the County of Norfolk, ("Norfolk Superior Court") is the court which by statute has jurisdiction over certain criminal cases arising within the Commonwealth of Massachusetts and within the venue of Norfolk County.

3. On or about April 19, 1979, the Norfolk Superior Court commenced hearings with respect to preliminary motions in the case of *Commonwealth of Massachusetts v. Albert Aladjem*, Norfolk Superior Court, No. 73102-9. At that time, the Norfolk Superior Court caused to be placed on the courtroom

door a sign which stated "closed." All persons approaching the courtroom doors were told by courtroom personnel that they may not enter the courtroom. Subsequently, certain members of the press were told by court personnel that they could enter the courtroom during the preliminary hearings. On information and belief, one reporter was allowed to enter the courtroom and was informed by Judge Mulkern that the reporter could remain in the courtroom, but should not publish any information that was disclosed in the course of the hearings on preliminary motions.

4. On, April 24, 1979, counsel to the plaintiff went to the Norfolk Superior Court. Counsel was informed that the hearings for that day had been terminated. Judge Mulkern told counsel that the hearings would continue the following day.

5. On April 25, 1979, at the commencement of the proceedings before Judge Mulkern, counsel for the plaintiff filed with the clerk three motions (1) a motion to revoke orders concerning exclusion of the press; (2) a motion for hearing; and (3) a motion to intervene. These documents are attached hereto as Exhibits A-C respectively. The motion to intervene requests that the plaintiff be allowed to intervene for the limited purpose of asserting its rights to access to the trial and hearings on the related preliminary motions. The motion to revoke prior orders refers to prior proceedings of the Court, where the press had been excluded, and requested a transcript of those proceedings. The motion for hearing requested that the plaintiff be granted an opportunity to be heard before the Court with respect to orders excluding the press from the trial and related hearings on preliminary motions.

6. At the commencement of the proceedings, before the Court, Judge Mulkern held that plaintiff's motions would not be accepted for filing. Without the opportunity for hearing requested by plaintiff and without argument of counsel, the Court further ordered that pursuant to G.L. c. 278, § 16A, the

trial would be closed and the press and general public would be excluded. A copy of the transcript relating to these orders is attached hereto as Exhibit D.

7. Counsel to the defendant objected to the Court's order that excluded the press and public.

8. The Assistant District Attorney for the Commonwealth stated that the exclusion of the press and public is not requested by the Commonwealth.

9. The refusal of the Norfolk Superior Court to permit members of the press to be present at the trial constitutes an impermissible burden on the plaintiff's right to gather and disseminate news, is supported by no compelling state interest and is in violation of the First Amendment to the Constitution of the United States and Articles XVI and XXIX of the Massachusetts Constitution.

10. To the extent that G.L. c. 278, § 16A is construed as authority to exclude members of the press from a trial where the defendant requests a public trial and the presence of the press, that statute is in violation of the Sixth Amendment to the Constitution of the United States and Article XII of the Massachusetts Constitution.

11. The trial, including the inpanelment of the jury in this case is scheduled to commence tomorrow, April 26, 1979 and the orders barring entry to those proceedings by the press remain in effect.

12. Plaintiff has no plain, speedy or adequate remedy at law.

WHEREFORE, plaintiff prays that:

1. A short order of notice issue to defendant commanding it to appear forthwith and answer the allegations of this Complaint.

2. That a temporary restraining order issue forthwith commanding defendant to permit members of the press to attend the trial in the case, *Commonwealth of Massachusetts v. Aladjem*, Norfolk Superior Court, Docket No. 73102-9.

3. That this Court issue a permanent injunction ordering defendant to permit members of the press to attend the trial and proceedings in the case of *Commonwealth of Massachusetts v. Aladjem*.

4. For such other, or further, relief as this Court deems meet and just.

By its attorneys,

THOMAS H. WALSH, JR.
JAMES F. MCHUGH
JANIS M. BERRY
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300

Exhibit A.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT
A3102-9

COMMONWEALTH OF MASSACHUSETTS

v.

ALBERT ALADJEM

Motion to Revoke Orders Concerning Exclusion of the Press

The Globe Newspaper Company (the "*Globe*") moves that this Court enter an Order revoking any prior Orders of the Court which exclude the press, including the *Globe* from the trial and related hearings on preliminary motions in the above-captioned case and/or which prohibit the publication of information disclosed in said proceedings. The Globe also moves that a transcript of the proceedings be made available.

By their attorneys,

THOMAS H. WALSH, JR.
JAMES F. MCHUGH
JANIS M. BERRY
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300

DATED: April 25, 1979

Exhibit B.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
73102-9

COMMONWEALTH OF MASSACHUSETTS

v.

ALBERT ALADJEM

Motion for Hearing

The Globe Newspaper Company moves that it be granted an opportunity for hearing before this Court with respect to any Orders of this Court which exclude the press from the trial and related hearings on preliminary motions in the above-captioned case and/or which prohibit the publication of information disclosed in said proceedings.

By their attorneys,

THOMAS H. WALSH, JR.
JAMES F. MCHUGH
JANIS M. BERRY
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300

DATED: April 25, 1979

Exhibit C.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS. SUPERIOR COURT
73102-9

COMMONWEALTH OF MASSACHUSETTS

v.

ALBERT ALADI[illegible]

Motion to Intervene

The Globe Newspaper Company hereby moves for leave to intervene in these proceedings for the limited purpose of asserting its rights to access to the trial and hearings on related preliminary motions in connection with the above-captioned case.

By their attorneys,

THOMAS H. WALSH, JR.
JAMES F. MCHUGH
JANIS M. BERRY
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300

DATED: April 25, 1979

Exhibit D.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss: SUPERIOR COURT
No. 73102-9

COMMONWEALTH

v.

ALBERT T. ALADJEM, JR.

Third Criminal Session
Dedham, Massachusetts
Wednesday, April 25, 1979

Transcript of Hearing on Motions

BEFORE: Hon. Robert V. Mulkern, Associate Justice

APPEARANCES:

Ms. Ruth McNiff, Assistant District Attorney,
For the Commonwealth
Paul T. Smith, Esq. and Harvey R. Peters, Esq.
Co-Counsel, For the Defendant

[2] *Wednesday, April 25, 1979*

THE COURT. Now, with respect to the case on trial, I have been handed three motions.

Do counsel for the respective parties have copies of these motions?

Ms. McNiff. No, Your Honor.

Mr. Peters. No, Your Honor.

The Court. One is entitled a "Motion to Intervene" and it is signed by Attorney Thomas Walsh, I believe, and another attorney.

Another is a Motion For Hearing With Respect to Any Orders of the Court Relating to Exclusion of The Press.

And the third is a Motion to Revoke Orders concerning exclusion of the press.

Would counsel for the respective parties now have copies of those motions?

Mr. Smith. Yes, Your Honor.

The Court. Do you, Miss McNiff?

Ms. McNiff. Yes, Your Honor, I do.

The Court. Would you like a moment to read them?

Ms. McNiff. Yes, I would.

The Court. Please do.

[Pause.]

[3] The Court. Have counsel now had an opportunity to read this motion?

Ms. McNiff. Yes, Your Honor.

Mr. Peters. Yes, Your Honor.

The Court. I will take, first, the Motion to Intervene, which has not been filed.

It has simply been handed to the Court. The case before the Court, the criminal case of Commonwealth v. Aladjem, involves three high school girls, ages at the time of the offense, 15, 16 and 17, respectively; and I ask to be corrected by Miss McNiff if I am wrong in what I say.

Ms. McNiff. You are correct, Your Honor.

The Court. The ages, now, are 16 and 17; am I correct on that?

Ms. McNiff. Sixteen, sixteen and seventeen.

The Court. Sixteen, sixteen and seventeen.

The three girls are high school students as of this time. The allegations of the indictments contain allegations of forcible rape and allegation of forced unnatural rape, in at least one instance.

Am I correct, Miss McNiff?

Ms. McNiff. You are correct, Your Honor.

The Court. The statute in question is General Laws Chapter 278 Section 16A, which provides that at a [4] trial of indictments such as are before the Court, when the alleged victims are under eighteen years of age, the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case. This statute parallels, in a general way, General Laws Chapter 119 Section 65, which provides that in a juvenile session, where a defendant is a juvenile, the Court shall exclude the general public from the room admitting only such persons as may have a direct interest in the case.

This Court rules that the Motion to Intervene may not be filed. That the Globe Newspaper Company, which is named in the body of the motion, is not a party to the litigation on trial before the Court. This Court further rules that, consistent with General Laws Chapter 278 Section 16A, this trial will be conducted in such a manner that the general public shall be excluded from the courtroom, including the press, and that only such persons as may have a direct interest in the case will be permitted in the courtroom.

This ruling and Order results from a reading of the statute and from the feeling of the Court that a child-victim of an alleged sexual attack is entitled minimally to at least the same protection that a child-[5] defendant in a case involving sexual matters has.

I will advise the representatives of the Globe newspaper that are present in the courtroom that it is not anticipated that impanelment of this case will commence until tomorrow, for whatever action those representatives care to take.

Okay.

I am returning the papers which have been presented to the Court.

Ms. Barry. Pardon me, Your Honor. My name is Janice Barry and I represent the Globe Newspaper Company.

Is Your Honor also ruling that the Globe's Motion For a Hearing on the Closure Order is also denied?

The Court. Well, Miss Barry, I took the motions in what I thought was an appropriate order. Since I will not accept for filing the Motion to Intervene, for the reason that I have indicated, basically a question of standing, then I am not going to act upon any other motions.

Ms. Barry. Then, Your Honor, as I understand, is saying that the Globe has not standing to be heard before Your Honor?

The Court. I am saying no more. I am not [6] accepting for filing the Motion to Intervene.

Ms. Barry. Thank you, Your Honor.

The Court. You are welcome.

Mr. Peters. Would Your Honor note the Defendant's exception to so much of Your Honor's ruling as excludes the general public and the press from the trial in this case.

The Court. You have made your exception.

[Defendant's exception noted.]

Ms. McNiff. Not to be technical, Your Honor, but, for purposes of the record, may the record indicate that Your Honor's ruling was on Your Honor's own motion and not at the request of the Commonwealth?

The Court. His Honor's ruling was made on the basis of the statute which appears at least to be mandatory.

Ms. McNiff. I understand that, Your Honor.

Thank you.

Okay. Let's proceed with the — I am sorry, gentlemen.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS — SUPREME JUDICIAL COURT
NO. 79-191 CIV. — BRAUCHER, J.

THE GLOBE NEWSPAPER

V.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK

APPEARANCES:

Charles J. Hely, Assistant District Attorney
618 High Street
Dedham, Massachusetts 02026

Margot Botsford, Assistant Attorney General
1 Ashburton Place
Boston, Massachusetts

James F. McHugh, Esq.
100 Federal Street
Boston, Massachusetts

April 26, 1979
Full Court Room — 13th floor
New Court House
Boston, Massachusetts

THE PROCEEDING

COURT: Mr. McHugh, this is your application, I believe.

MR. McHUGH: It is, Your Honor. As a preliminary matter, I might say, Your Honor, that we did notify both the counsel for the defendant in the underlying criminal action and the Attorney General's Office of the fact that this proceeding would be here at this time this morning. It was our understanding that a representative of the Attorney General's Office would be here.

COURT: Well, if he has been given notice and is not here, I suggest we go forward.

CLERK: The Attorney General is here, I believe, Your Honor.

COURT: Oh. Well, we will wait for just a moment. All right, now you may go ahead.

MR. McHUGH: Thank you, Your Honor. Your Honor, this is an application, as the complaint reveals, under General Laws 211, Section 3, for an order requiring the Justices of the Norfolk County Superior Court to open to the press a criminal trial, which yesterday the Court ordered closed. Factually, the matter arose in essentially the following manner. There had been a series of pretrial hearings, which the Court was holding in this case. A case which involves allegations of rape of three women, ages sixteen, sixteen, and seventeen, I believe, current ages, in the town of Wellesley. During the last several days a number of pretrial hearings had been held by the Court and all of those hearings had been closed to the press and to the public. At some point yesterday, the Globe became aware of the possibility that an order would be entered seeking to close, or ordering closed, the trial itself. And thereupon, counsel for the Globe went to the Norfolk Superior Court and attempted to talk with the Judge and

determine what the Court's views in that regard were. The Court said, as I understand it, that it would take the matter under advisement and would have some kind of a decision ready the following day, which was yesterday, April 25th. On yesterday, the Globe filed with the Court. . ., or more precisely, went to the Court after attempting to determine who the appropriate Clerk to receive the papers was, and finally finding the Judge's court room Clerk, gave to that Clerk a motion to intervene for the limited purpose of asserting its right to attend the trial sessions. A motion for a hearing, prior to entry of any cloture order, and a motion for a revocation of any prior cloture orders that had been entered. The Court, as the transcript attached to our complaint reveals, denied the Globe's motion to intervene and said that it would not take up any of the other motions, and in addition, entered an order stating that the trial would be closed to the press and to the public under the authority of General Laws Section 16A.

COURT: Well, I don't want to foreclose anybody else from making a point. But, it seems to me, that your procedure adequately raised the question whether the Globe has any right to have the trial public. . .

MR. McHUGH: All right.

COURT: . . . In the face of the statute. And, I think, maybe you should direct your attention to that.

MR. McHUGH: All right, Your Honor. We believe, and I am going to urge the Court today, that chiefly for three reasons. . . four reasons the lower court's order was invalid. Succinctly and in summary form put, those are that Section 16A does not by construction require the result the Court reached in this case. Second, that if it does, it is unconstitutional under the First Amendment to the Constitution of the United States. In addition, if it does, it is unconstitutional under the Sixth Amendment to the Constitution of the United States. And finally, that wholly apart from the substantive result one

reaches in consideration of those issues, it is a denial of the First Amendment Rights of the press to enter such an order without some form of a preliminary hearing addressed to the merits of the issue concerning whether the trial should be closed. Turning first to the construction argument. There are, essentially, two cases decided by this Court which have dealt in thorough fashion with the requirements of Section 16A. The first is *Commonwealth* v. *Blondin*, where the Court held that that statute was an exception to the general rule of publicity with respect to trials and should be broadly construed in favor of publicity, and that indeed the only purpose for that statute was to exclude idle people who in the Court's view often were attracted in large numbers to sensational sex trials. And, that that statute should not be construed in such a manner as to simply keep everybody out of the court room. Indeed, the Court went on in *Blondin* to say that on the record there before it, it appeared that the press had not been kept out, and raised the question in a parenthetical, concerning whether the statute in any event could reach the press. The second significant decision was the *Marshall* case, both of these are cited in our memorandum. And in that case, the Court held, building on the foundation of *Blondin* laid, that it was an error and an error of reversible dimension to exclude from the trial, under the authority of Section 16A, the mother, the brother, the sister, or friends of the defendant. Again, stating that the interest was in keeping simply idle people who had nothing else to do and customarily flocked the sensational sex trials out of the court room. As construed therefore, it seems to us that the prior constructions of this Court is placed on Section 16A clearly don't reach the press. And indeed, one of the very cases before this Court was a case in which the press was present. And thus, in our view one need not reach the more profound constitutional issues that also inevitably attend this matter. But if the construction argument is not in and of itself

successful . . . convincing in these circumstances, it is our view that the First Amendment itself has something substantial to say about the circumstances under which Section 16A may be applied. In making that argument we start first with the proposition that news gathering is an activity protected by the First Amendment of the Constitution. Not only because the Supreme Court in *Branzburg* v. *Hayes* said that it was. But also because of the logical proposition that without some effort or ability to gather news, reporting of the news would simply be babble. You can't have one without the other. In addition to that, unlike the customary, or the frequent so-called access case, we are not dealing here in a trial situation with a source of information which historically has been closed to the press and the public. We are dealing with an event, a trial, which is presumptively a public event. The action of the Court . . . which the Court took in this case, therefore in our judgment, cannot be viewed as simply a refusal to allow people in. It is instead an affirmative act which closes off to the press and public an historically available source of information. And viewed in that context, viewed as the affirmative act of government in stepping between a source of information and a potential recipient of information. It seems clear, and we would strongly urge on the Court, that nothing less than a compelling state interest will support the Court's order and that that interest of the order which seeks to achieve that interest, if indeed it exists, it must be the narrowest conceivable order which will satisfy the interest in question. Now in that framework, we again, I would respectfully suggest, come back to the *Blondin* case where the Court identified what the interest to be served by Section 16A was. And that interest was in keeping idle people out, because the presence of idle people at sensational sex trials tended to degrade the administration of justice and degrade the moral tone of the community. That, I would respectfully submit, is the interest which this Court has identified Section 16A as seeking to serve.

COURT: It didn't say anything about the interest of juveniles?

MR. McHUGH: The primary . . . To the best of my recollection it did not, Your Honor.

COURT: Because as you have described it, it would apply to adult trials as equally with juvenile trials.

MR. McHUGH: Well, there is a corollary statute of recent vintage, which under certain circumstances permits, at least in theory, cloture of those trials as well, if everybody agrees. This is a case, which I am sure Your Honor is aware, the cloture order was not entered here at the instance of the Commonwealth. The Commonwealth didn't request it and the defendant objected to it. So we have everybody in agreement that the trial should be open and the Judge proceeding under what he believes to be his obligation under the statute. Again a characteristic that conceivably distinguishes it from the run of the mill, or the customary case. But, identifying that interest in those terms, we would respectfully suggest, almost answers the question itself whether those interests, or the compelling kinds of interests which are necessary to support an order . . .

COURT: Well, you . . . It just has to be misstated somehow, because if the interest is simply keeping idle people out of public sex trials, the thing is grossly underinclusive by talking only about people under eighteen, victims under eighteen.

MR. McHUGH: Well, I would agree with that, Your Honor. But, if you look at the . . .

COURT: It is an irrational way of carrying out any such purpose. But, it is so obvious on the face of it that it is designed to protect juvenile victims and nobody else.

MR. McHUGH: But, Your Honor, there is the problem, because it doesn't, as construed by this Court, do that. It doesn't exclude whole hosts of people. Most importantly it doesn't exclude anybody. And indeed, as a matter, as this Court said, a reversible error anybody that the defendant can

identify as his friend, who he wants to be present in the court room while the trial was in progress. It did not operate in the *Blondin* case to exclude the press. And therefore, however one defines the interest apart from what this Court said in the one sentence in the opinion that I can find, which specifically says that this is the intent of the legislation. Whatever the Court said about that interest, it does not fulfill it if the interest is identified as being one of protection of juveniles as that statute has been interpreted. And that is the problem. Not only of statutory construction, but, in our view, of the First Amendment. For that kind of an interest, I would respectfully suggest, is not . . . is both underinclusive . . . Measured against that kind of an interest, the statute is underinclusive and the interest is not simply a compelling one. Beyond the First Amendment interests, there are significant Sixth Amendment interests involved. The Sixth Amendment, a number of cases have construed as not conferring simply on a defendant the option, if you will, to have a public trial. A trial which, if so viewed, he could seek to have closed simply by waiver of his right to a public trial, but as conferring substantial interests . . . substantial protections on the press as well. We have cited in the brief one of the cases from the Third Circuit, which indicates that the Sixth Amendment confers on the public a significant right, because in the Court's words, secret favor can transpire as well as injustice to a defendant when proceedings take place behind closed doors.

COURT: Which case is that?

MR. McHUGH: Pardon me.

COURT: Which case are you referring to?

MR. McHUGH: That is the *Peyton* case on page . . .

COURT: You said Third Circuit, you cite it here as Fourth Circuit.

MR. McHUGH: I'm sorry. Fourth Circuit.

COURT: That is before the *Nebraska Press* case, isn't it?

MR. McHUGH: *Peyton* is before the *Nebraska Press* case, yes, Your Honor. There is another case, however, called *United States* v. *Cianfrani*, which is not cited in the brief, I regret, but which appears at 573 Fed. 2nd 835 decided by the Third Circuit in 1978.

COURT: 573 F 2nd?

MR. McHUGH: 835, decided by the Third Circuit in March of 1978, which it builds on the foundation laid by the case I have cited and reaches the same conclusion. Another relevant case, again not cited in the brief, which I apologize, is *Nixon* v. *Warner Communications* cited at 435 U.S. 589, in which the Court held that while there was no obligation on the District Court . . . The United States District for the District of Columbia to allow broadcasting of the tapes played at the Watergate trial of Mrs. Mitchell, et al. The right to a public trial was subserved if the press and public, in the conjunctive, were present at the trial itself and that one need not be given access to broadcast evidentiary materials, oral evidentiary materials that were introduced at the trial. There are a number of additional interests that the public has identified in those cases stemming from the existence of the Sixth Amendment, which indicate that that Amendment is not simply something which confers a right on a defendant and which he, therefore, has the power and ability to waive. In this case, of course, he has not waived it. But we are not here asserting his rights, but instead the rights of the press and the public. The final point that we would like to raise this morning is that given the intents . . . First Amendment interest involved, whether or not one resolves . . . however one resolves them ultimately, and we would respectfully suggest that here there is only one resolution for them, given the intensity of those interests it is, we would respectfully suggest, error for the Court to enter an order of this kind without at least some kind of a hearing, an adversary hearing, at which members of the press

are given notice and have some opportunity to appear to present to the trial court the very kinds of arguments that I am standing before Your Honor presenting, with respect to whether or not such an order has entered. In the *Ottaway Newspaper* case, as Your Honor is aware, this Court held that, whether or not as a matter of constitutional law, at least some kind of a hearing should proceed, or shortly follow an order impounding the public papers. In our view, this is a fortiori situation, because unlike, at least in this Court's view, the public . . . the records in civil cases, which the court had before it there, trials have themselves a significantly additional interest which are available to the public and which the public needs to be informed about. And therefore, this kind of an order, we would respectfully suggest, need have some kind of a hearing take place before it is entered. For those reasons, chiefly four, and we would respectfully suggest that the order entered by the Norfolk Superior Court was erroneous, both as a matter of statutory law and as a matter of constitutional law. And that this Court should order that court to revoke the order and permit the press and public to attend the trial which is scheduled to commence at 10:00 this morning. Thank you, Your Honor.

COURT: Thank you, Mr. McHugh. Now, Ms. Botsford, I understand the District Attorney wants to be heard here. I don't know whether you want to be heard before or after.

MS. BOTSFORD: I'll be heard after.

MR. HELY: Just briefly, Your Honor.

COURT: This is Mr.?

MR. HELY: Hely.

COURT: Hely.

MR. HELY: nd (*sic*) I don't purport to interfere with, or attempt to represent the Justices of the Court, Your Honor, simply as an intervenor, or as amicus to the Court making clear the District Attorney's position in the underlying crimi-

nal action. And, that was before the trial judge, and before this Court today, that we do not oppose the presence of the press in this case. We are fully aware of the statute, Chapter 278, Section 16A. And the interests that we identify primarily are the interests of persons under eighteen who are victims of sex crimes, or as so labeled in the statute. And a special privacy interest in those persons, which according to the statute, outweigh the normal rights of the defendant to a public trial and the normal rights of the public to have access to those trials. And in these special circumstances they outweigh. But our position before the trial judge, and it is before this Court, that in some circumstances a trial judge, where the defendant is asserting his right to a constitutional, public trial, a trial judge may consider that as outweighing the otherwise legitimate statutory interests, particularly where the Commonwealth on behalf of the victims, and this is literally on behalf of the victims in the sense that they were consulted fully by the prosecutor in this case. The Commonwealth waives whatever rights it may have to exclude the press. The constitutionality of the statute, we are not seeking to undermine in any sense. We are simply seeking to have a fair trial in this case in which the guilty person can be found guilty if he is guilty. And the fair trial can proceed without error in the record to subject the Commonwealth and the victims to a new trial. And we also wanted to make it clear here this morning that the victims have been held for trial, the three victims, ages 15, 16, and 17, have been held in the courthouse, held for trial since April 17th and today, I think, is the eighth day where we are ready to impound. We have had a long series of pretrial motions in which the victims have testified, been subjected to a lot of cross-examination, and it is an extremely high level of anxiety and emotional stress on these people. And, the Commonwealth just simply seeks to go forward today and not have a stay in this case, regardless of your determination of the cor-

rectness of the trial judge's ruling we ask that it be a prompt determination one way or the other. And we simply wanted the Court to know that we didn't oppose the access to the press in this case.

COURT: Thank you, Mr. Hely. Before we hear from Ms. Botsford, I would like to also inquire . . . I have not gotten a proof of service here . . . Oh, I do have affidavit of notice, delivery to the Attorney General. But, you said notice was given to the defendants here?

MR. McHUGH: It was by telephone, Your Honor.

COURT: Telephone notice.

MR. McHUGH: We, also, yesterday afternoon called the Clerk of the Norfolk Superior Court to inform her that the action was pending here with a request to so notify the defendant in the event that we weren't able to reach them, but we did reach them last night.

COURT: All right, thank you.

MR. HELY: But the defendants, I think, were also under direct order from Judge Mulkern to be there today at 10:00 in Dedham, ready for the Judge's final ruling on the motion to suppress and possibly an impoundment this morning. So, I can understand their absence here today.

COURT: I understand. All right, Ms. Botsford.

MS. BOTSFORD: Your Honor, I have a memorandum here, which I can give to you.

COURT: Go ahead.

MS. BOTSFORD: Your Honor, Judge Mulkern opposes any reversal of his order precluding the press from the trial on several grounds. First, as he interprets Section 16A, it requires the exclusion of the press. Second, even if the Court should . . . this Court should find that it is not a mandatory exclusion, he would exercise his discretion and require the exclusion of the press, because he thinks that the rights of the minor victims here demand . . . the rights of privacy demand protec-

tion. We believe that if Section 16A is construed to require, or at least to authorize in a Judge's discretion the exclusion of the press, it is constitutional. It does not violate the First Amendment Rights of the press, nor the Sixth Amendment Rights of the defendant. We also contend that the press does not have standing to raise the rights of the defendant to a public trial under the Sixth Amendment. I will first discuss the requirement, or authorization of the statute. In *Commonwealth* v. *Blondin*, there is a single line of dictum suggesting . . . saying that there is no showing the press were excluded. We think this should be viewed as dictum and that the clear words of the statute have to be read in their own terms. The statute says that members of the public . . . "The presiding justice shall exclude the general public from the court room." I think that, at least, in . . . That this common sense and the *Ottaway* case suggest that when a statute requires exclusion of the general public, it also refers to the press. On common sense grounds, it seems clear that that prohibition to the general public would be undermined if the press were permitted to attend and to report on all of the details of the trial proceedings. Although the public may not, in fact, attend in person, they would read the Globe and get whatever details the reporters happen to feel like reporting. And, I think that the *Ottaway* case suggests that there is an identity of the public and the press, because in that case, which did involve a press exclusion, the Court cited specifically that there were statutes in the Commonwealth which authorized the exclusion, or access . . . limitations of access to either Court proceedings or to the court records. And, in a footnote on I think it is page 980 . . . Well, it is the ninth footnote, specifically mentions this section as one of those statutes which . . .

COURT: In which case is this?

MS. BOTSFORD: This is in the *Ottaway* case.

COURT: All right.

MS. BOTSFORD: The Court specifically mentions Section 16A as a statute which excludes the public from trials involving certain sex offenses. And I think that when you read the *Ottaway* case it is clear that the dictum in *Blondin* should be regarded as nothing but dictum. And that, at the very least, the Judge had the discretion and the authority to order the press excluded from the trial. I will now turn to the First Amendment question. We believe that the . . .

COURT: Let me just stop you there for a moment.

MS. BOTSFORD: Okay.

COURT: The point made by the District Attorney, you haven't quite answered. If this statute is to protect the victim, . . . I'm starting over. If the statute is designed to protect the victims, the juvenile victims, and it opens up under *Blondin* to allow in people as having a direct interest, who are relatives and friends, . . . I guess that is the *Marshall* case. It is not necessarily inconsistent with such a statute to say that if the defendant objects to a cloture, that represented by counsel and with relatives and friends to advise him and so forth, that that interest is satisfied.

MS. BOTSFORD: That the victim's interest is satisfied?

COURT: Yes, if that is the purpose . . . if that is the function of the statute.

MS. BOTSFORD: I think there is a difference between having friends and relatives of the defendant at the trial and having the press, because whatever the defendant's relatives may say to people they know, there is just simply not the same broad public dissemination of that . . . of whatever testimony or evidence is submitted to the trial.

COURT: Well, the statute is certainly phrased in mandatory terms. But, before you get to the Constitution, I think, you have to see what possible reading of the statute is. I took Mr. Hely to be saying that when the defendant objects to closing the trial, that at least opens up a possibility of a discretion

in the judge not to apply this statute. Now, it sounds to me as though you . . .

MS. BOTSFORD: Well . . .

COURT: . . . We sort of have the fallback position as to that. The statute is mandatory on its face. If it opens up to allow some discretion, he has exercised the discretion, you say.

MS. BOTSFORD: That is correct. Now . . .

COURT: But, I have a little trouble with . . . If the prosecutor and the defense counsel representing the defendant both want the thing public, and there is no objection from the victims, why . . .

MS. BOTSFORD: I would have trouble . . .

COURT: Who is the judge protecting?

MS. BOTSFORD: I agree with you that that presents a problem. I must say that I have come into this case reading the papers and having one telephone conversation with the judge . . .

COURT: I understand.

MS. BOTSFORD: So, I am not aware that he is aware . . .

COURT: You are not very far behind me, I can tell you that.

MS. BOTSFORD: I don't know what his knowledge of the alleged victim's wish is as to public, or private . . .

COURT: Well, he has been through a certain amount of pretrial procedure, which you and I have not been through . . .

MS. BOTSFORD: That is right.

COURT: And there may be factors there that effect his discretion. Well, I didn't mean to interrupt you. Assume with me that the statute authorizes what he did, either on the basis it is mandatory, or on the basis that he has some discretion. I would like to hear you on the constitution issues.

MS. BOTSFORD: On the First Amendment issue, I think that the cases which the Globe relies on are not directly apposite.

Those cases, the *Cox* case, or the *Nebraska Association* case, or another case, the *Oklahoma Publishing Association* case . . .

COURT: Those cases, as I recall them, and my recollection may be weak here, say that once you open it up and allow the public in . . .

MS. BOTSFORD: Correct.

COURT: . . . That you are not entitled at all to restrict anybody from publishing anything about it . . .

MS. BOTSFORD: Any factual . . .

COURT: So once it is public it is public all the way.

MS. BOTSFORD: That is correct. And what we are dealing . . .

COURT: And that to me has some feedbacks to say that it becomes rather more serious to open it up to people.

MS. BOTSFORD: Well . . .

COURT: I take it as part of what Mr. McHugh is saying, once you let relatives and friends of the . . . it would be the defendant in, I take it, a gag order to prevent those relatives and friends from writing books about it, or publishing articles about it, or interviewing the press about it, would violate the *Nebraska Press* case, because the *Nebraska Press* case, as I understand it gave no special status to a newspaper reporter. Any citizen has the same right.

MS. BOTSFORD: Well, I don't think that we need to reach that issue here. It may be, if that issue were presented directly, there would be differences found between the friend and the newspaper reporter.

COURT: All right.

MS. BOTSFORD: I think that what Your Honor says though is correct that this issue presented here is one which in *Nebraska Press* and in the *Cox* case was specifically left open by the Supreme Court, which was the power of a state to close certain proceedings to the public generally, which I take to mean in those cases the press as well. And in the *Ottaway*

case, this Court noted that the issue of the right of a state to close certain proceedings had not been addressed in *Cox* or *Nebraska Association* and went ahead and upheld an impoundment order of certain records in a civil proceeding against a bank. I think that what the *Ottaway* case stated is still a correct view of the United States Supreme Court law, which is that the issue of the . . . how much a state can close proceedings is one that is unclear and it depends on specific interests raised. For instance, in the *Branzburg* case itself, there is language by the Court stating that the press certainly has no right under the First Amendment to have access to information which is not available to the public generally. So that I think we are dealing with an area that is not settled by the cases and that insofar as it has been addressed by this Court; this Court has held that there are reasonable . . . there can be circumstances in which proceedings can be closed to access by the press. We believe that this is one of them. Mr. McHugh suggested that *Blondin* says the only purpose of the statute is to prevent idlers from coming to the proceedings. I think if you read a little farther there is mentioned specifically of female victims of sex crimes and the trauma that is imposed upon them in having to testify in trials that would be made worse if it was generally known. And I think that is what is at issue here. The Judge believes that just as *A Juvenile*, an alleged juvenile offender, has a closed proceeding under Chapter 119, Section 65, the victims of a sex crime also have a right to have closed proceedings. That certainly no less right and perhaps even more. And that is what he believes operates here and that is why he believes that the press should not be permitted to attend and report on this proceeding, because the details of the crimes, as they are presented in the trial, should not be . . . become the possession of the public generally through the Boston Globe. I, just in . . .

COURT: Let me just paraphrase what you have said as I read you. If the idlers want to stay home and the Globe serves their purposes by catering to their needs or their desires . . .

MS. BOTSFORD: That is right.

COURT: . . . That doesn't change the picture of *Blondin*. I take it that the plaintiff here would not accept that characterization of their labors.

MS. BOTSFORD: I am also suggesting that *Blondin* discussed this other . . . I mean, specifically mentioned the victims. And it is not just simply . . .

COURT: All right.

MS. BOTSFORD: . . . The administration of justice and the integrity and decency, or dignity of the court proceedings. There are also specific interests of the victim at issue here. And that is what the Judge is concerned about in this case. And just to summarize, I am saying that the First Amendment cases of the United States Supreme Court and this Court certainly do not preclude having this kind of a proceeding closed. And we think, in fact, support the idea that this kind of a proceeding can be closed. As to the Sixth Amendment rights, I am afraid I have not had time to thoroughly look into that.

COURT: Well, can you help me with one thing? There is a case pending in the Supreme Court, which is referred to in the plaintiff's brief here, as *Gannett Co.* v. *Depasquale*. Apparently, it was argued last November, they state. And the name of that sounds as though it was a case brought by a newspaper. Gannett Co., I think, is not a criminal defendant. It is referred to as if it were a case that involved at least . . .

MS. BOTSFORD: Unfortunately, I do not know that . . .

COURT: . . . An objection made by the defendant . . .

MS. BOTSFORD: I have not had a chance to look at that case.

COURT: Well, all right. I take it, it hasn't been authoritatively resolved yet. I believe that the decision below must

have been against the *Gannett Co.* And, if I am right that the *Gannett Co.* is some kind of a publisher . . .

MS. BOTSFORD: It seems reasonable to assume from the title.

COURT: . . . Then they aren't seeking to overturn a decision below. And, it is characterized . . . I am going to get back to Mr. McHugh on this. But it is characterized as a case where the defendant seeks cloture, which in this case we don't have the defendant in force today. But, it is represented that the defendant objects to this. So, it is the other way around.

MS. BOTSFORD: Right. On the . . . I was not aware from the papers that the defendant did object to the cloture of this trial. If . . .

COURT: Well, I am just taking that as . . .

MS. BOTSFORD: Right, I understand that is what Mr. McHugh . . .

COURT: Mr. Hely joins him.

MS. BOTSFORD: . . . And Mr. Hely suggested it also. If, Your Honor, would permit me, I will seek to find out more about the . . . further about the reasons that the Judge believes this trial to be closed, if you feel that is necessary, or the Sixth Amendment issues . . .

COURT: I am not disposed to postpone decision here. As I understand it, it was scheduled to go on with the selection of the jury today. Now, I have been informed that Judge Mulkern has put that off until tomorrow.

MS. BOTSFORD: Oh.

COURT: So that we are not under any particular gun . . .

MS. BOTSFORD: When I spoke to him he said he would wait until 11:00, but I guess he has pushed it back some more.

COURT: Well, this is all the information . . . just a report . . .

MS. BOTSFORD: Right. It is later than when I spoke to him.

COURT: But, either way I am not disposed to . . . I mean this thing . . . Obviously, they are trying to expedite the trial of that case. And I think it can go forward either with, or without the press and I am not disposed to delay things. So, I am getting ready to . . . I've been reading your memorandum, so I won't be accused of denying the Commonwealth a hearing. I am getting ready to . . . I think I am going to decide this before I leave the bench. So, I don't need that . . . I do want to get some help from Mr. McHugh on what he has to say about *Depasquale*. Have I correctly inferred what that is about?

MR. McHUGH: You have, Your Honor. But, that case, as Your Honor correctly observed, involved the defendant who wanted things closed, and it only dealt with pretrial proceedings . . .

COURT: Pretrial?

MR. McHUGH: It has nothing to do with the trial itself.

COURT: Now, in the case before us, we are talking about the trial itself, exclusively. There is no problem . . . The statute, in terms, talks about trial and does not seem to say anything about pretrial.

MR. McHUGH: That is correct, Your Honor. And we have intentionally not raised here any issues about pretrial . . .

COURT: I mean it might well be read that the trial is a whole process and the pretrial proceedings are a part of it. But, on its face, it just says trial. And that is what we are talking about here is trial.

MR. McHUGH: That is correct.

COURT: All right.

MR. McHUGH: On another day we might be back to visit with you . . .

COURT: But, I am right that the New York Court of Appeals, is that who it was in *Depasquale* . . .

MR. McHUGH: *Depasquale*. That is correct. The Court of Appeals for the State of New York.

COURT: This is all not memory, but inference . . .

MR. McHUGH: Well, basically . . .

COURT: . . . That I just associate *Gannett Co.* with upstate New York.

MR. McHUGH: Let me tell you briefly what happened, if Your Honor would like me to. In that case that was a small town murder of a police officer, I believe, somewhere in upstate New York. It was an intensely publicized murder, because not only of the smallness of the community and the absence of crime generally, but also of the brutality of the murder. Two young defendants were arrested someplace in Michigan, I believe, and returned. One of them was sixteen, and the other was an adult, I believe. They were returned to the county where the murders took place and were indicted for those murders. A series of pretrial hearings took place involving confessions. And with respect to those, the Court held that those pretrial hearings would be closed on two theories: one, prejudicial pretrial publicity; and two, and one of the issues that I think is a major one before the Supreme Court, that if indeed it were determined that a confession were impermissible extracted from a defendant and therefore as a result it was suppressed, then to allow through the medium of a public suppression hearing further dissemination of that in and of itself and apart from the prejudicial pretrial publicity would involve the Court in a violation of the defendant's Fifth Amendment rights. And therefore, the Court . . . those proceedings were closed . . .

COURT: They were closed . . .

MR. McHUGH: Were closed . . .

COURT: The New York Court of Appeals upheld the closing and the *Gannett Co.* . . .

MR. McHUGH: Has appealed.

COURT: . . . Has gone to the Supreme Court with it.

MR. McHUGH: That is correct.

COURT: I see.

MR. McHUGH: One other point that was raised, Your Honor. The objection of the defendants to the cloture of these hearings is incorporated in the transcript, which is attached to the complaint. And on the last page of the transcript the defendant asks that his objection to the Court's order closing the proceedings be noted.

COURT: I think I had seen that, but I . . . Who is counsel for the . . .

MR. McHUGH: Mr. . . .

COURT: Mr. Peters is it?

MR. McHUGH: Peters.

COURT: Because I . . . It says, "MR. PETERS: Would Your Honor note the defendant's exception to so much of Your Honor's ruling as excludes the general public and the press from the trial in this case? COURT: You have made your exceptions." So, I think that supports your point.

MR. McHUGH: I just wanted, if I could, Your Honor, say one brief word about the privacy interest that was asserted by the Attorney General in this case. First of all, to come back, not to sound like a broken record, but to come back to the point I made earlier in my discussion with Your Honor. If that is the interest, it simply isn't served by the way this statute has been interpreted and the way that it is carried out. Secondly, because once you allow the friends, and once you allow others into the court room there is no break which is, nor indeed can be, in our judgment imposed of their dissemination of what they have seen to members of the press, or to anybody else. And the only effect, therefore, of enforcing this kind of a statute is that the press gets secondhand information from people who have a bias one way or the other, either because they are

friends, or because they are participants on the side of the government in what is going on inside. So, the sole effect is not to protect the privacy. But to deny the press and the public an opportunity to see for itself what is going on. Secondly, unlike a civil case, which could be brought as the result of these kinds of things, this is not a private matter. There is no such thing, I would respectfully suggest to Your Honor, as a private crime. That is what the civil law is for essentially. And while taking a private dispute in the Court may, under many circumstances, remove privacy interests which otherwise would apply, in a criminal matter, there are substantial, additional public interest, in addition to the interests of the defendant and the victim, which are served by the very fact that a trial is taking place. And therefore, this thing can't be viewed simply as an effort to protect privacy. And, I would respectfully suggest that the privacy interests here are minimal if existent at all. For those reasons, I would respectfully renew my request that the order be revoked.

COURT: Thank you, Mr. McHugh. Now, Ms. Botsford, I may have cut you off. There was a fourth point that Mr. McHugh made that you did not direct attention to. And that is, the claim, that, at the very least, the First Amendment requires that before you close up the court room you give the press the chance to be heard.

MS. BOTSFORD: Your Honor, I really am not in a position to address that, because I have not had a chance to talk to the Judge sufficiently about it. It seems to me that in view of the District Attorney's representation that the victims here waive whatever rights they have, perhaps that would not be a . . . perhaps that would be a good idea to have the Judge consider these arguments on all sides of the issue. I simply don't have enough information to address it.

COURT: Thank you. I do think that this is one which I ought not to take time to write a great essay about. I propose

to go through the issues right now and dispose of this. What I rule on the law is not likely to conclude the matter. These are large issues which are dealt with at a higher level. But we do have to decide what is to happen on this particular case. First as to the statute, it is mandatory in its terms. But, I don't . . . I think I have to decide whether it is utterly mandatory so that it overrides the desires of everybody, prosecutor, victims, defendants, judge and so forth, because even if you allow some room for waiver by the defendant and the prosecutor, I think the Judge must have some discretion as to what he will do with that. And, I am not in the position here to say that he abused such discretion as he had, because, obviously, he had been through a number of proceedings with respect to this case, which are entirely a closed book to most of us who are here this morning. So I think we are confronted with the constitutional issue. My reading of the First Amendment cases on this is that if you once open a trial there is no such thing as opening it part way. Once you have opened it, it is opened all the way. And the only way to avoid complete publicity is to close the hearing. Now, you can close it and still allow certain people in, obviously the people who have to be there. And apparently, our court has said you can bring in relatives and friends of the defendant. I cannot believe that giving the Judge some discretion in matters of this kind violates the First Amendment anymore than an order for the sequestration of witnesses violates the First Amendment. I don't understand that a newspaper reporter is anything but another citizen who . . . and there is no such thing as having a status conferred by law by being employed by a newspaper or by some other . . . one of the public media that any citizen is free to write a book, fill out a handbill, circulate it, publish it, put it on a plaque and publicize it. And he has just as much right as any newspaper reporter. Now, . . . I'm leaving aside the question whether there may be a difference between the relatives and friends of the defend-

ant and members of the public generally. I suppose you can be admitted . . . For example, a lawyer may be admitted to a proceeding on some understanding that he, at least, will not become a newspaper reporter. So, I don't think the First Amendment point is made out. If there is a requirement under the First Amendment of having a hearing, it seems to me that probably that was satisfied. Although rather summarily satisfied when the Judge did hold a hearing on the question of whether the Globe should be permitted to intervene. I take it, not a great deal of argument was permitted on that. But, it is not clear to me that much had to be said. So, that brings us to the Sixth Amendment right. And I must say, I find that the most troublesome part of this. And what I say will not conclude the matter. And, I take it this is where the District Attorney is in a rather difficult situation here. If this case goes forward over the defendant's objection and exception as a closed trial and that turns out at some later date to have been an error, the trial may turn out to be a wasted exercise which will have to be done over again. And, what I say today isn't going to have any effect on that, because I don't think even though the defendant has been notified of these proceedings, I don't think he can be thought to be a party in the sense that he would be bound by any ruling that I would make. And that of all this is, that I am not going to interfere on an interlocutory basis with the ruling of the trial judge. My power to do so, under Chapter 211, Section 3, is a power which exists only when no other remedy is provided. And the defendant, at least, has a remedy by appeal. I don't want to try and advise the Globe Newspaper Co. as to whether they have any other remedy, but I am doubtful about their standing to raise the Sixth Amendment issue. So the result will be that this petition will be denied. The Court will be in recess.

—THE END OF TAPE—

[Certificate Omitted]

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 79-191 CIVIL

THE BOSTON GLOBE

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK

Order

This case came before the Court on the plaintiff's petition for extraordinary relief pursuant to G. L. c. 211, § 3.

There was argument by counsel for the plaintiff and by the assistant attorney general. The assistant district attorney made a statement to the Court on behalf of the prosecution in the underlying criminal matter.

Upon consideration thereof, it is ORDERED that the petition be, and it is hereby, denied.

BY THE COURT (BRAUCHER, J.)

JOHN E. POWERS,
CLERK.

ENTERED: April 26, 1979

A true copy.
Attest:

4-27-79 JEAN M. KENNETT
Asst. Clerk.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 79-191 CIVIL

THE GLOBE NEWSPAPER

vs.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK

Judgment

This case came on for hearing before the Court, Braucher, J. presiding, and the issues having been duly heard and an order entered,

It is ORDERED and ADJUDGED,

that the petition be, and it is hereby, dismissed.

Dated at Boston, Massachusetts, this seventh day of May, 1979.

JOHN E. POWERS
Clerk of Court

A true copy.
Attest:

JOHN E. POWERS,
Clerk of Court

May 8, 1979

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH

CIVIL NO. 79-191

GLOBE NEWSPAPER COMPANY
V.
THE SUPERIOR COURT FOR
THE COUNTY OF NORFOLK

MOTION TO SUPPLEMENT RECORD ON APPEAL

The parties to this Appeal hereby move pursuant to Mass. R. App. P. 8(e) that the record on appeal in this case be supplemented by including the attached "Supplemental Statement to Record on Appeal," which shall also be included in the Record Appendix.

And, as basis therefor, the parties say that the attached Supplemental Statement to Record on Appeal reflects certain facts which occurred subsequent to the filing of the Petition, which is the subject matter of this Appeal.

Appellant/Plaintiff,
Globe Newspaper Company
By its Attorneys,

/s/_____
James F. McHugh
Janis M. Berry
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300

Appellee/Defendant,
The Superior Court for
the County of Norfolk
By its Attorneys,

/s/_____
Margot Botsford
Assistant Attorney General
Department of the Attorney General
One Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 737-1014

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR THE COUNTY OF
SUFFOLK, No. 79-191

GLOBE NEWSPAPER COMPANY,
PLAINTIFF,

v.

THE SUPERIOR COURT FOR
THE COUNTY OF NORFOLK,
DEFENDANT.

SUPPLEMENTAL STATEMENT
TO RECORD ON APPEAL

The issues presented in this appeal concern an Order entered on April 25, 1979 by a judge of the Norfolk Superior Court in the trial of *Commonwealth* v. *Aladjem*, Criminal No. 73102-9. The trial judge ordered that the trial would "be conducted in such a manner that the general public shall be excluded from the courtroom, including the press, and that only such persons as may have a direct interest in the case will be permitted in the courtroom." On the same day, April 25, 1979, the Globe Newspaper Company filed a Petition for Extraordinary Relief pursuant to G.L. c. 211, § 3 in the Supreme Judicial Court for the County of Suffolk. At a hearing on April 26, 1979, a single justice of that Court denied the plaintiff's Petition and on May 7, 1979, that Court entered a

Judgment, which dismissed the Petition. On May 17, 1979, plaintiff filed a Notice of Appeal.

Subsequent to the filing of the plaintiff's Petition above referred to, there were further proceedings in connection with the trial in *Commonwealth v. Aladjem, supra*. For purposes of this Appeal, the parties stipulate that the following facts which occurred subsequent to the filing of the Petition are true. However, the parties do not stipulate that these facts are relevant or material to the issues presented by the plaintiff's Appeal. Neither party waives any argument on such questions of relevance or materiality or on the proper interpretation of the facts for purposes of plaintiff's Appeal.

1. There is attached hereto as Exhibit A, a part of the trial transcript which records certain statements of the district attorney made at a lobby conference which took place on April 30, 1979.

2. On May 10, 1979 following a trial by jury, Albert J. Aladjem was found not guilty.

3. The individual who served as forewoman of the jury in that trial was an editor for the Quincy Patriot Ledger Newspaper.

4. Following the trial, on May 11, 1979 and May 12, 1979, the articles attached hereto as Exhibit B were printed in the Quincy Patriot Ledger Newspaper.

Globe Newspaper Company
By its Attorneys

/s/_____
James F. McHugh

/s/_____
Janis M. Berry
BINGHAM, DANA & GOULD
100 Federal Street
Boston, MA 02110
(617) 357-9300

Superior Court for the
County of Norfolk by its
Attorney, Francis X. Bellotti,
Attorney General

/s/_____
Margot Botsford
Assistant Attorney General
Department of the Attorney General
One Ashburton Place, Room 2019
Boston, MA 02108
(617) 727-1014

EXHIBIT A

LOBBY CONFERENCE

Monday, April 30, 1979

MS. MC NIFF. Your Honor, not to belabor a ruling that has been already made, but I spoke with each of the victims regarding your ruling excluding the press to see particularly what their feelings were about the press being in the courtroom, if at all.

Each of them indicated that they had the same concerns and basically they are privacy concerns.

The difficulty of obtaining any kind of guarantee that the press would not print their names or where they go to school or any personal data or take pictures of them or attempt to interview them, those concerns come from their own privacy interests, as well as the fact that there are grandparents involved with a couple of these victims who do not know what happened and if they were to find out by reading in the paper, every-one was concerned about what would happen then. And they stated that if it were at all possible to obtain a guarantee that this information would not be used, then they wouldn't object to the press being included. I explained that that is very difficult guarantee to obtain because the Court cannot issue a conditional order, or anything like that, but I just wanted to put on the record what their concerns were and what they were afraid of.

THE COURT. Okay.

Thank you.

Now what else do we have?

MS. MC NIFF. Those were the two things on my list this morning. That is all. I guess we just have to get the rest of the jury.

EXHIBIT B

ALADJEM FOUND INNOCENT OF WELLESLEY RAPES

DEDHAM — A Norfolk Superior Court jury yesterday found Wellesley tennis pro Albert T. Aladjem Jr., 33, innocent of charges that he raped three teenage girls last September.

The jury of eight men and four women deliberated five hours before returning the verdict. The trial was closed to the public and the press by Judge Robert V. Mulkern despite Aladjem's request for an open trial.

"We're exhausted but very, very happy said Mrs. Henrietta Aladjem, mother of the defendant. "We've been crying, but we're all very happy."

Aladjem, who lives with his parents in Wellesley, said he was "glad it is over." His attorney, Harvey Peters of Boston, said Aladjem's tennis shoe business "was destroyed" by the case and that he "has nothing to go back to."

"Through seven months, what kept us going was that we knew he was innocent. He could never have done such a crime. We never doubted he was innocent," said Mrs. Aladjem.

"Ultimately, justice prevailed and we're very grateful."

Aladjem had been accused of raping three students of the Dana Hall School in Wellesley last Sept. 23. The students, who ranged in age from 15 to 17, said they were assaulted at gunpoint in a wooded area near the school as they returned to their dormitories after a dance.

Aladjem pleaded innocent. His attorney maintained the arrest was a case of mistaken identity.

Quincy Patriot Ledge, City Edition—
Friday, May 11, 1979 — Page 1

During the trial, the victims testified that the assailant wore a mask that covered his mouth and nose, but that during the rapes the mask slipped and exposed his face. Aladjem was arrested two months after the rapes.

Judge Mulkern closed the eight-day trial to the public and the press because of a state law which he said required him to do so. The law provides that in rape cases involving persons under 18, only parties with a "direct interest" in the case can attend the trial.

The Boston Globe has challenged the constitutionality of the law on the ground that the press and the public have direct interest in criminal trials. A hearing on that aspect of the case is expected this fall before the state Supreme Judicial Court.

Aladjem declined to discuss the judge's decision to close the trial, but his attorney said: "Our stand has not changed. We wanted a public trial then and our feelings have not changed."

Dorothy J. Newell, a Patriot Ledger news executive, served as jury foreman on the Wellesley rape trial that was closed to the public and the press. Here is her personal account.

[Picture of Dorothy Newell omitted]

By DOROTHY j. NEWELL
Of The Patriot Ledger

Three teenage girls sat talking on the back step of a dormitory at a private girls school in Wellesley last September.

A dance was just over and the campus was still buzzing with activity.

Quincy Patriot Ledger, City Edition—
Friday, May 11, 1979 — Page 1

One girl caught a glimpse of a man passing between the dorms — a man who had no pants on.

"A streaker," she remarked to her friends. Moments later the figure approached, with a gun, and threatened to harm them if they cried out or refused to go with him.

He herded them down a service road to a nearby wooded area between the dorms and a brookside park and path.

There he raped them all in a brief, but brutal attack. Even the sounds of hikers on the brookside path did not stop him.

The girls remained in the woods, as ordered, for a few moments after he left, then returned to their dorm for help.

They would learn later that a man dressed much like their assailant, but wearing trousers, had accosted three upperclassmen with a gun at a dorm several blocks away, an hour earlier.

This time, in spite of a warning, one of the girls ran away. The man joked about his threats and disappeared into the darkness.

Seven months later I found myself summoned for jury duty on the case.

And on the day I was to end duties as associate editor of the editorial page and begin a new job as assistant community editor, I was named foreman of a 16-member jury in Norfolk Superior Court.

It was a different assignment. During my 25 years as a reporter and editor, I had never seen a courtroom, even on television, from the perspective of the jury box.

I first felt that I was in a conflict of interest. I had been trained to dig out the news and now, for the next two weeks, I was not to tell a soul what was going on.

Quincy Patriot Ledger, City Edition—
Friday, May 11, 1979 — Page 1

But in deciding not to postpone my jury service to a later time and a different trial, Judge Robert Mulkern had said that my recent assignment as an editorial writer demanded that I be objective. The defense and prosecuting attorneys did not challenge me — much to my surprise.

There was no question in the minds of the jurors in Judge Mulkern's courtroom these past two weeks that someone brutally raped three girls, and threatened three others.

But we did question whether Wellesley tennis pro Albert Aladjem, who lived a few blocks away and who had been identified by the students, was the person.

In the hours of deliberation yesterday, the first time we were allowed to discuss the evidence, concern about that identification surfaced early. It remained a question with us to the end. And it was the chief reason why we unanimously agreed — finally — we should find the defendant innocent of the charges.

For many of us it was our first experience as jurors. Most of us knew we would neither be able to take notes in the courtroom, nor to talk about the case at home. I found the note-taking restraint particularly tough. I was used to covering a trial with a pencil and notebook in my hand.

None of us knew we would not be discussing the testimony even among ourselves during the trial.

Keeping an open mind, as we were continually cautioned, meant that at recesses — and there were many of them — we spent the time on trivia. We got acquainted with each other, talked about our hobbies, interests, jobs, played cards. Some of us caught a few winks. I crocheted all but one skein on an afghan and another finished a half pair of mittens.

(Please see NEWELL — Page 11)

Quincy Patriot Ledger, City Edition—
Friday, May 11, 1979 — Page 1

Newell

(Continued from Page 1)

We came from all parts of the county — from Sharon, Franklin and Millis at the southern extremity, Canton, Randolph and Milton at the north. There were four from Weymouth, two each from Norwood and Braintree.

We had our extroverts and our quiet reflectors, and a variety of temperaments in between.

No two first names, nor occupations were alike.

It became a test. What to talk about when you cannot talk about what you're thinking about was the exercise.

And there was some emotional shifting of gears when we walked from the lighthearted camaraderie of the juryroom where we were discussing anything but the trial, into the courtroom for the next round of testimony.

All of us hoped, and some expected, that the evidence would show very clearly the guilt or innocence of the defendant.

But this was not to be.

We were frustrated by contentions that were not supported by evidence. It seemed to us that police were careless, in their investigation and that coordination was lacking between police and the district attorney's office.

But after seven days of testimony and five hours of deliberation, we found the defendant innocent.

Someone raped those three girls seven months ago.

But we did not believe the state proved who.

Quincy Patriot Ledger, City Edition—
Friday, May 11, 1979
(continuation from Page 1)

TRIPLE RAPE:
A CLOSED CASE

By DOROTHY J. NEWELL
Patriot Ledger Staff

The burden of proof is on the Commonwealth to prove guilt in a criminal case.

In the Wellesley triple rape case, Judge Robert Mulkern told jurers (*sic*) the state had to prove beyond reasonable doubt that well-known tennis instructor Albert Aladjem was the man who did it.

Three high school girls were certain Aladjem was the one who forced them at gunpoint to walk with him to a wooded area behind their dormitory where the multiple rapes took place.

The teenagers testified they were too frightened to scream or to bolt, too afraid their friends would be hurt if they did not follow orders.

Their assailant was a tall, thin, athletic man in his late 40s, with bare legs, wearing a hooded sweatshirt and jacket, dark-rimmed glasses, a scarf or bandana covering part of his face, and a gun in his hand.

The girls walked ahead of their attacker, his left hand on one girl's neck, his right hand, holding the gun, on another girl's right shoulder, the third girl between the two.

They stumbled down a wooded incline to the edge of a brookside park, lighted from the dorms and a nearby streetlight. The girls lay side-by-side on their stomachs facing the dorms.

Quincy Patriot Ledger, City Edition—
Saturday, May 12, 1979 — Page 1

In the span of 15 minutes the man had the girls turn over and disrobe one at a time. They testified that during the multiple rapes the covering slipped below his chin and, although he warned them repeatedly not to look at him, they were able to see his face. They also saw his profile when he turned to watch hikers on the brook path.

The girls' courtroom description of the assailant more closely matched the defendant's features than the brief descriptions

Editor's Note: The triple rape trial of Wellesley tennis pro Albert T. Aladjem Jr., which ended in Norfolk Superior Court Thursday, had been closed to the press and public.

Yesterday, Patriot Ledger news executive Dorothy Newell gave her views of a newsman turned juror. Today she recounts some of the details of the case and arguments the jury was asked to consider.

Aladjem was found innocent of all charges at the end of the eight-day trial.

they gave the night of the attack to the campus security officer, local police, hospital medical staff, and a taped interview with a member of the district attorney's staff.

Local police, corroborating the girls' courtroom testimony, testified from their memory because the notes they had taken during their interview had been destroyed.

A local police officer helped the three teenagers assemble a composite picture of their assailant the day after the assault. After it was published in the local newspaper during the week, the investigating officer testified that a number of persons, including his own brother — who is also a Wellesley police officer — said the defendant resembled the composite.

Aladjem's picture, an informal pose from a college periodical, was included with mug shots in a photo array shown to

the girls two and a half weeks later. One girl recognized Aladjem as her former tennis instructor, moving the picture out of the array with the comment "That can't be him, I know him," and continued to look at the other pictures.

(Please see TRIAL — Page 16)

Quincy Patriot Ledger, City Edition—
Saturday, May 12, 1979 — Page 1

Trial

(Continued from Page 1)

She testified that while she feared he was the rapist, she did not tell police because she was afraid. Later in the day she called the police asking to see a profile view of Aladjem.

The other girls told police that Aladjem's photo most closely resembled the person who raped them.

Police showed the first girl a profile one month after the assault. She made no comment but called them the next day to identify Aladjem as her assailant.

Police arrested him that night. Days later, the two other girls identified Aladjem wearing a hood in a lineup — with men from the sheriff's office — as the person in the line most closely resembling their attacker.

To counter this argument, the defense pointed out the poor lighting in the area of the assault and the differences in their descriptions. The defense attorney argued that if the girls could see well enough to identify Aladjem later from a photograph, one of them would have recognized him during the rape as her old tennis teacher.

Quincy Patriot Ledger, City Edition—
Saturday, May 12, 1979 (continuation from Page 1)

The heart of the defense was Aladjem's alibi. Three waitresses corroborated his testimony that he was at a restaurant in neighboring Wayland when three high school juniors at the same private school were accosted by a man with a gun and a hood an hour before the rape.

A Wellesley patrolman and his wife testified in rebuttal for the prosecution that one of the waitresses — a close friend — was at their home and not at the restaurant that night. But the defense returned the waitress to the stand as the final witness of the two-week trial, to firmly reiterate her testimony.

Aladjem testified at length, accounting for all of the time surrounding the rape. He played tennis with a friend, tested a racket and later that evening returned it to the owner; he ate at Wellesley College rec hall, cleared the desk at his Wellesley Center pro tennis shop, showered at Babson College where he coached and returned home for a talk with his father. He shaved and telephoned a friend before leaving for the restaurant, calling to his father as he left the house.

Aladjem's father testified he spoke to his son when he returned home from the restaurant at about the same time the three students had said the rape was taking place, and that he did not hear him go out again before he fell asleep ninety minutes later.

The jurors concluded that the state did not prove beyond reasonable doubt that: — Aladjem was not at the restaurant that night; — that the three students correctly identified their assailant; — that Aladjem did not have a valid alibi.

Quincy Patriot Ledger, City Edition—
Saturday, May 12, 1979 (continuation from Page 1)

Corrected: 5/29/80

COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court for the Commonwealth,
At Boston February 26, 1980.

In the case No. SJC-1825

GLOBE NEWSPAPER COMPANY

vs.

SUPERIOR COURT

pending in the Supreme Judicial Court for the County of Suffolk No. 79-191.

ORDERED, that the following entry be made in the docket; vix., —

Appeal dismissed in accordance with the opinion.

By the Court,

s/Patrick J. Hurley, Clerk.

February 26, 1980
See opinion on file.

SUPREME JUDICIAL COURT

GLOBE NEWSPAPER COMPANY
vs.
SUPERIOR COURT

Suffolk. October 9, 1979. — February 26, 1980.

Present: HENNESSEY, C.J., QUIRICO, KAPLAN, WILKINS, LIACOS, ABRAMS, JJ.

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on April 25, 1979.

The case was heard by *Braucher*, J.

James F. McHugh (*Janis M. Berry* with him) for the plaintiff.

Mitchell J. Sikora, Jr., Assistant Attorney General (*Allen B. Sherr*, Assistant Attorney General, with him) for the defendant.

Marguerite M. Dolan, for the Greenfield Recorder, amicus curiae, submitted a brief.

James C. Heigham, for the Massachusetts Newspaper Publishers Association, amicus curiae, submitted a brief.

Thomas G. Simons, District Attorney, & *Stephen R. Kaplan*, Assistant District Attorney, for the District Attorney for the Northwestern District, amicus curiae, submitted a brief.

LIACOS, J. On April 25, 1979, the plaintiff, Globe Newspaper Company (Globe), petitioned a single justice of this court for extraordinary relief pursuant to G. L. c. 211, § 3. The petition challenged the April 25, 1979, order of a trial judge of defendant Superior Court, who acted under the authority of G. L. c. 278, § 16A, to close a criminal trial to the general public. The judge had denied the Globe's motion to

intervene and had denied the Globe's motion for a hearing and motion to revoke the order concerning exclusion of the press. Thus, the Globe sought from the single justice a temporary restraining order and permanent injunction ordering the judge to permit members of the press to attend the trial and related proceedings. On April 26, 1979, as the jury in the criminal trial were being empanelled, a single justice conducted a hearing on the Globe's petition and denied it after stating orally his reasons for his decision. A judgment was entered on May 7, 1979.[1] The Globe appeals. Mass. R.A.P. 1 (b), 365 Mass. 844 (1974).

During the pendency of this appeal, the criminal trial proceeded to its conclusion. Thus, the issue raised before the single justice is now moot, and the appeal from his judgment must be dismissed. The issues raised by this record, however, are significant and troublesome, and are "capable of repetition yet evading review." *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911); *Gannett Co.* v. *DePasquale*, U.S. , (1979).[a] We deem it appropriate therefore to express our views on the issues argued. *Wellesley College* v. *Attorney Gen.*, 313 Mass. 722, 731 (1943). In so doing, we consider matters now part of the record, but which were not put before the single justice.

Although neither the single justice nor this court is compelled to take the allegations in the Globe's petition as true, we may do so in light of the circumstances that the Commonwealth did not file an answer, Mass. R. Civ. P. 8 (d), 365 Mass. 749 (1974), and that the facts alleged in the petition are not disputed. The petition shows that on or about April 19, 1979, the Superior Court in the County of Norfolk commenced hearings with respect to preliminary motions in the case of Commonwealth vs. Albert Aladjem, Norfolk Su-

---

[1] The opinion of the United States Supreme Court in *Gannett Co.* v. *DePasquale*, U.S. (1979) (99 S. Ct. 2898 [1979]), had not been given at the time of the hearing before the single justice.

[a] 99 S. Ct. 2898, 2904 (1979).

perior Court, No. 73102-9. The court caused a sign marked "closed" to be placed on the courtroom door, and court personnel turned away people seeking entry.[1] After failing to gain entry on April 24, 1979, counsel for the Globe on April 25 attempted to file with the court the motion to intervene and the other two motions. At the commencement of proceedings before the court, the judge ruled that he would not accept the Globe's motions as being proper for filing. Without holding a hearing and without argument of counsel, the judge ordered that the trial be closed and the press and general public excluded. Counsel for the defendant objected to the closure order, and the assistant district attorney stated that the Commonwealth did not request closure.

The transcript of the hearing before the judge is annexed to plaintiff's petition. It reveals that the Aladjem case involved three girls, ages sixteen, sixteen and seventeen at the time of trial. The indictments contained allegations of forcible rape and forced unnatural rape. The judge ruled that G. L. c. 278, § 16A, requires closure. He stated, "This ruling and Order results from a reading of the statute and from the feeling of the Court that a child-victim of an alleged sexual attack is entitled minimally to at least the same protection that a child-defendant in a case involving sexual matters has."

At the April 26 hearing before the single justice, the Globe and the Attorney General appeared. The assistant district attorney also appeared and stated: "[W]here the defendant is asserting his right to a constitutional, public trial, a trial judge may consider that as outweighing the otherwise legitimate statutory interest, particularly where the Commonwealth on behalf of the victims, and this is literally on behalf of the victims in the sense that they were consulted fully by the prosecutor in this case. The Commonwealth waives whatever rights it may have to exclude the press."

---

[1] Court personnel later told some members of the press that they could enter during the preliminary hearings. Apparently one reporter did enter, but the judge told him that he should not publish information received at the hearing.

In a supplemental statement, the parties stipulated to facts concerning events after the April 26 hearing. In an April 30 conference with the trial judge, the assistant district attorney represented that she had spoken with the three victims about the presence of the press in the courtroom; the victims stated that they would not object to inclusion of the press if the press promised not to print any personal data about them, photograph them, or attempt to interview them. On May 10, 1979, following a jury trial, the defendant Aladjem was found not guilty.

The Globe argues that the single justice erred in denying its petition, claiming that G. L. c. 278, § 16A, did not authorize the judge to exclude the press from the Aladjem trial. This argument relies not only on statutory language and purpose, but also the principle that a statute should be construed to avoid constitutional doubts. We agree in part that the order closing the entire trial was in error. The Globe also raises several constitutional issues. The Globe contends that the First Amendment to the Constitution of the United States and art. 16 of the Declaration of Rights to the Constitution of Massachusetts protect the right of the public and press to be present during the conduct of criminal trials. In particular, the Globe argues that G. L. c. 278, § 16A, is overbroad and was applied unconstitutionally in this case. Also, the Globe maintains that the trial court's failure to hold a hearing on the closure issue violated the Globe's rights to due process of law. Finally, the Globe argues that the Sixth Amendment creates a right in the public to attend criminal trials. We reach only some of these questions today.[3]

---

[3] Indeed, the single justice could have refrained from deciding any issue on the merits. Ordinarily, we will exercise our jurisdiction under G. L. c. 211, § 3, only "if no other remedy is expressly provided." Here it is arguable that the Globe might have sought a declaratory judgment that G. L. c. 278, § 16A, does not authorize exclusion of the press, and that even if it does, the statute violates the First and Sixth Amendments to the

1. The Globe argues that G. L. c. 278, § 16A, is ambiguous and is unconstitutional. Before we can turn to these constitutional arguments, we must construe G. L. c. 278, § 16A, in light of the asserted ambiguity.[4] See *Bellotti* v. *Baird*, U.S. , n.24 (1979);[b] *Poulos* v. *New Hampshire*, 345 U.S. 395, 402 (1953). In considering the claimed ambiguity, we are mindful of two principles of statutory construction. First, "[w]ords or phrases in a statute are to be given their ordinary meaning. They are to be construed according to their natural import and approved usage." *Burke* v. *Chief of Police of Newton*, Mass. , (1978).[c] "[T]he statutory language itself is the principal source of insight into the legislative purpose. . . . [W]here the language of the statute is plain and unambiguous, . . . legislative history is not ordinarily a proper source of construction." *Hoffman* v. *Howmedica, Inc.*, 373 Mass. 32, (1977).[d] However, "[i]f the language of a provision is unclear, a court may look to outside sources for assistance in

---

United States Constitution and art. 16 of the Declaration of Rights. G. L. c. 231A.

However, we think the single justice was correct in hearing this matter in view of the doubts concerning the practicality of an alternative remedy in the circumstances, and in view of the significant public issues raised by the petition. We state our views for similar reasons. See *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 550-551 (1977).

[4] General Laws c. 278, § 16A, reads as follows: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." As to the constitutionality of the "begetting" statute, G. L. c. 273, § 11, see *Commonwealth* v. *MacKenzie*, 368 Mass. 613 (1975). General Laws c. 273, § 11, was subsequently repealed by St. 1977, c. 848, § 7.

[b] 99 S. Ct. 3035, 3049 n.24 (1979).

[c] Mass. Adv. Sh. (1978) 425, 427.

[d] Mass. Adv. Sh. (1977) 1488, 1493.

determining the correct construction." *Rosenbloom* v. *Kokofsky*, 373 Mass. 778, (1977).*

We consider three possible ambiguities in G. L. c. 278, § 16A. First, to what part or parts of a judicial proceeding does the locution, "At the trial . . . the presiding justice shall exclude the general public," refer? Second, is the word, "shall" used in a mandatory or directory sense? Third, are members of the press "persons" with "a direct interest" in the case? The Globe urges that the latter two questions mark ambiguities in the statute, and it is at least clear that the language "a direct interest" has required construction in the past. *Commonwealth* v. *Marshall*, 356 Mass. 432 (1969). *Commonwealth* v. *Blondin*, 324 Mass. 564 (1949), cert. denied, 339 U.S. 984 (1950). Because neither party has recognized the ambiguity underlying our first question, we take time to explicate it here.

The word "trial" is itself ambiguous. In determining the meaning of a word in a statute, we look to its ordinary lexical meaning. *Burke* v. *Chief of Police of Newton*, *supra*. "Rather than using terms in their everyday sense, '[t]he law uses familiar legal expressions in their familiar legal sense.'" *Bradley* v. *United States*, 410 U.S. 605, 609 (1973) (citation omitted). In its legal definition of "trial," Webster's New International Dictionary 2705 (2d ed. 1959) suggests that the term has several senses: "In a general sense *trial* includes all proceedings from the time when issue is joined, or more usually when the parties are called to try their case in court, to the time of its final determination; in criminal law the term *trial* is, however, generally restricted to proceedings subsequent to swearing in the jury." This range of meanings also appears in Black's Law Dictionary 1675 (rev. 4th ed. 1968). Despite the dictionaries' suggestion that "criminal trial" should be defined restrictively, our older cases have endorsed a definition of "trial" as "the examination before a competent tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of

---

*Mass. Adv. Sh. (1977) 2534, 2537.

determining such issue." *Commonwealth* v. *Soderquest*, 183 Mass. 199, 201 (1903), overruled on other grounds, *Commonwealth* v. *Penrose*, 363 Mass. 677, 679-681 (1973). This definition is broader than the lexical definition. Fact-finding hearings may occur before the jury are empanelled. A hearing to determine whether there is probable cause to bind a defendant over for trial is an example. It is not clear whether a hearing on a motion to suppress would constitute "examination . . . of the facts put in issue in a cause." Cf. *Commonwealth* v. *Soderquest*, *supra* (arraignment is not trial). According to our cases' definition, then, the distinction between "trial" and "pretrial" is not plain. But compare Mass. R. Crim. P. 13, 14, Mass. (1979), with Mass. R. Crim. P. 19, 20, Mass. (1979). The recent disagreement among members of the United States Supreme Court concerning the applicability to a motion to suppress of the word "trial," appearing in the Sixth Amendment, is further evidence that the distinction is blurred. See *Gannett Co.* v. *DePasquale*, *supra*. Indeed, it is not clear that the "trial" necessarily encompasses all events occurring after the jury are empanelled. For example, a side bar conference, a hearing of legal arguments, or a voir dire hearing held in the absence of the jury to determine the admissibility of evidence may not meet the *Soderquest* definition. Thus, "trial" has no single, irresistible interpretation.

Even if we assume that "trial" has an unambiguous meaning, the sentence, "At the trial . . . the presiding justice shall exclude the general public," is still ambiguous. "At the trial" is ambiguous, for "At" may mean "throughout," but it may also mean "at some time in" or "during parts of." Thus, the legislative order, "At the trial the presiding justice shall charge the jury," would not imply that the charge should continue throughout the entire trial. On the other hand, "At the trial the presiding justice shall maintain order in the court room" would apply throughout. The meaning of the sentence varies with the nature of the act which the judge is ordered to do. Certain acts, such as a jury charge, occur once and within a limited time. Others,

such as maintaining order, are continuous. And some acts, such as excluding the general public, can logically occur at many stages of the trial. Thus, even if "trial" has a definite signification, neither the words of the statute alone nor the nature of the act commanded settles whether G. L. c. 278, § 16A, requires partial or wholesale closure.

2. In order to resolve the ambiguities in G. L. c. 278, § 16A, we must first consider whether any principles of statutory construction should influence our analysis. At least two such principles exert pressure in this case. It is well-established that a "statute must be construed, if fairly possible so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (Holmes, J.). Accord, *Commonwealth* v. *King*, Mass. , (1977);[f] *Alegata* v. *Commonwealth*, 353 Mass. 287, 290 (1967); *Worcester County Nat'l Bank* v. *Commissioner of Banks*, 340 Mass. 695, 701 (1960); *Ferguson* v. *Commissioner of Corps. & Taxation*, 316 Mass. 318, 323-324 (1944). It is also well settled that a statute in derogation of the common law should be strictly construed, so long as the construction is consistent with the statutory purpose. See *Hayon* v. *Coca Cola Bottling Co. of New England*, Mass. , - (1978);[g] *Vallin* v. *Bondesson*, 346 Mass. 748, 753 (1964); *Houghton* v. *Dickinson*, 196 Mass. 389, 391 (1907).

(a) The Globe raises several questions about the constitutionality of excluding the press from a criminal trial. In the face of those arguments and the United States Supreme Court's uncertain posture on the issues, see *Richmond Newspapers, Inc.* v. *Virginia*, Va. , decided July 9, 1979, which recently has been argued before the Supreme Court on appeal;[h] *Gannett Co.* v. *DePasquale*, *supra*, we seek to shrink the region of possible constitutional doubts

---

[f] Mass. Adv. Sh. (1977) 2636, 2647.

[g] Mass. Adv. Sh. (1978) 1888, 1893-1894.

[h] 46 U.S.L.W. 3178 (No. 79-243) (appeal filed 8/14/79).

about G. L. c. 278, § 16A. Nevertheless, a number of reasons counsel against our deciding those questions today. We take care to point out that, even if we chose to decide the constitutional questions here presented, the question whether the State's interests outweigh a defendant's Sixth Amendment right to a public trial would in no way be before us; the defendant is not before this court. Furthermore, instead of deciding the moot issues of the Globe's First and Sixth Amendment rights, we await the United States Supreme Court's decision in *Richmond Newspapers, Inc.* v. *Virginia, supra*. Nor do we reach the question of press or defendant rights under the State Constitution. The Globe's contentions relying on art. 16 were not adequately argued in plaintiff's brief. Mass. R.A.P. 16 (a) (4), 365 Mass. 860 (1974). Indeed, the Globe's brief relegates the Constitution of this Commonwealth to one cursory, conclusory footnote. See *Beaton* v. *Land Court*, 367 Mass. 385, 389, appeal dismissed, 423 U.S. 806 (1975). As for State constitutional rights analogous to those arguably available under the Sixth Amendment, the Globe's brief is silent, and our Constitution is unclear, about the right to a public trial.

Finally, we decline to reach the constitutional questions because "[a] court will ordinarily 'not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of . . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.'" *Fazio* v. *Fazio*, Mass. , (1979).[1] See *Commonwealth* v. *Gustafsson*, 370 Mass. 181, 186 (1976). We can decide the present case on nonconstitutional grounds. Therefore, we do so. Also, because our second principle of construction — that statutes in derogation of the common law should be strictly construed — argues for a construction favoring publicity, our result minimizes constitutional

[1]Mass. Adv. Sh. (1978) 1539, 1553.

doubts about G. L. c. 278, § 16A. Although we do not squarely reach the constitutional questions raised today, we believe that the principles of construction we adopt bring us to a conclusion which approximates the results urged upon us by the Globe on constitutional grounds.[5] We turn to consideration of the relationship between G. L. c. 278, § 16A, and the common law.

(b) Public trials have been the rule at common law since the Anglo Saxons conducted their trials "like an ill-managed public meeting." F. Pollock, The Expansion of the Common Law 30 (1904). *In re Oliver*, 333 U.S. 257, 266 (1948). See generally *Gannett Co.* v. *DePasquale*, U.S. , - n.15 (1979).[j] *Id.* at - [k] (Blackmun, J., dissenting). Although in 1884 Mr. Justice Holmes' famous dicta stated some of the reasons for the rule, *Cowley* v. *Pulsifer*, 137 Mass. 392, 394 (1884),[6] this long established precept, so imbedded in our practice, required no explication until 1949. In *Commonwealth* v. *Blondin*, 324 Mass. at 569-570, while sustaining G. L. c. 278, § 16A, against a due process attack, we noted "the universal practice of our courts, especially in criminal cases, to keep the doors open, except as otherwise provided by statute."

Public trials protect against systematic use of the courts as instruments of political and religious persecution. *In re Oliver*, *supra* at 268-270. Publicity prevents abuses of a single judge's power. *Id.* at 270-271. See 1 J. Bentham, Rationale of Judicial Evidence 524 (J.S. Mill ed. 1827). The pressure of public scrutiny may deter witness perjury; *Com-*

---

[5] This approximate parellelism extends not only to the substantive doctrine, but also to procedural safeguards. See section 5 *infra*.

[j] 99 S. Ct. 2898, 2908-2909 n.15 (1979).

[k] 99 S. Ct. at 2925-2930 (1979)

[6] "It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."

monwealth v. *Bohmer*, Mass. , n.14 (1978),[l] and may engender confidence in court officials. *Gannett Co.* v. *DePasquale*, U.S. , (1979)[m] (Blackmun, J., dissenting). Open trials may also induce members of the public to come forward with new testimony or other evidence. *Commonwealth* v. *Bohmer*, *supra* at n.14.[n] Other benefits of publicity are more abstract. As the audience of the courts' struggle to do justice, the public learns how courts work and may suggest how courts can improve. At the same time, the public experiences the drama of justice being done. Like theater, the judicial drama teaches the audience not to make the participants' mistakes — it deters criminal misconduct — and permits a catharsis — a sense that wrongs have been righted.[7] Thus, the common law practice of open criminal trials improves the quality of justice done in the courts and binds the courts more closely to the society they serve. General Laws c. 278, § 16A, was enacted against the background of the common law tradition, and that is why we said in *Commonwealth* v. *Blondin*,

---

[l] Mass. Adv. Sh. (1978) 316, 330 n.14.

[m] 99 S. Ct. 2898, 2931 (1979).

[n] Mass. Adv. Sh. (1978) at 330 n.14.

[7] "[B]y publicity, the temple of justice adds to its other functions that of a school: a school of the highest order, where the most important branches of morality are enforced by the most impressive means: a theatre, in which the sports of the imagination give place to the more interesting exhibitions of real life. Sent thither by the self-regarding motive of curiosity, men imbibe, without intending it, and without being aware of it, a disposition to be influenced, more or less, by the social and tutelary motive, the love of justice. Without effort on their own parts, without effort and without merit on the part of their respective governments, they learn the chief part of what little they are permitted to learn (for the obligation of physical impossibility is still more irresistible than that of legal prohibition), of the state of the laws on which their fate depends." 1 J. Bentham, *supra* at 525. See Note, Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings, 91 Harv. L. Rev. 1899, 1906-1909 (1978). See also Note, The Right to Attend Criminal Hearings, 78 Colum. L. Rev. 1308, 1323 (1978). On the purpose of the criminal law to foster legal and moral responsibility in the citizenry, see generally Hart, The Aims of the Criminal Law, 23 Law & Contemp. Prob. 401 (1958).

supra at 571: "It is to be strictly construed in favor of the general principle of publicity."

3. Recognizing the power of the principles favoring publicity, we must identify the precise interests that overmatched the common law rule and thereby justified G. L. c. 278, § 16A, in the Legislature's eyes.[8] In *Blondin*, *supra* at 571, we considered the Legislature's purpose in enacting G. L. c. 278, § 16A. "Doubtless it was thought that female witnesses in particular could come forward, institute complaints, and testify with less reluctance, so that more justice would be accomplished if they could be relieved from the inhibitions imposed by the presence of a curiosity impelled audience." Although this formulation is generally correct, it does not put the matter strongly enough.

Originally enacted in St. 1923, c. 251, with the title "An Act to protect witnesses under the age of seventeen at trials for certain crimes," the statute was designed "for the protection of minors from the vulgar and obscene and from public degradation." 1923 House Doc. No. 1349. In St. 1931, c. 205, the statute was revised as part of a comprehensive reexamination of the treatment of children in the Commonwealth. 1931 House Doc. No. 1200. The Special Commission Established to Investigate the Laws Relative to Dependent, Delinquent and Neglected Children, and Children Otherwise Requiring Special Care stated the statutory purpose: "To spare girls of juvenile age the embarrassment, humiliation and demoralization of testifying to all the sor-

---

[8] "If the statute, because it modifies the common law, is to be strictly construed, yet the construction adopted should advance, rather than defeat, the purpose of the Legislature." *Houghton* v. *Dickinson*, 196 Mass. 389, 391 (1907). The Legislature, of course, has power to create exceptions to the rules of common law, *New Bedford Standard Times Publishing Co.* v. *Clerk of the Third Dist. Court of Bristol*, Mass. , (1979) (Mass. Adv. Sh. [1979] 515, 522-523), and the common law itself provided for exceptions to the rule of publicity. See *Commonwealth* v. *Blondin*, 324 Mass. 564, 571-572 (1949), cert. denied, 339 U.S. 984 (1950). Thus, we said in *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 546 (1977): "These statutes do not preclude the exercise by judges of a sound discretion to impose reasonable cloture, including impoundment, in other cases when found necessary."

did details of rape, incest, carnal abuse or other crime involving sex, incidental to open trial with examination and cross-examination." *Id.* at 90.

This legislative history reveals that G. L. c. 278, § 16A, stands at the nexus of two overlapping strands of policy; the Legislature wished to shield certain victims of sex crimes from the difficult experience of testifying in public;[9] and the Legislature joined this solicitude for victims with the broad, paternal protection afforded children generally.[10] The rape victim's ordeal in court has been well documented.[11] It

---

[9]Since G. L. c. 278, § 16A, was enacted, the Commonwealth has demonstrated sensitivity for the rape victim's plight in other ways. G. L. c. 41, § 97B (rape victim reporting, prosecuting and counseling services); G. L. c. 41, § 97D (reports of rape and attempted sexual assault must be kept confidential); G. L. c. 233, § 21B (limiting admissibility of evidence of victim's sexual history and reputation). See also *Commonwealth* v. *Gibbons*, Mass. , - , - & n.11 (1979) (Mass. Adv. Sh. [1979] 2168, 2170-2171, 2177-2178 & n.11).

[10]Many statutes are designed to protect the identity of minors who are subjects of litigation. See e.g., G. L. c. 119, § 60A (juvenile court records not open to public inspection); G. L. c. 119, § 65 (excluding public from juvenile court sessions). See also G. L. c. 119, § 60 (limiting uses of delinquency adjudication) held unconstitutional in part in *Commonwealth* v. *Ferrara*, 368 Mass. 162 (1975); G. L. c. 210, § 5C (records of adoption proceedings must be segregated); G. L. c. 276, § 100B (juvenile probation and court records may be sealed after three years from final entry). Generally, the purpose of these statutes is to prevent stigmatization of minors and to encourage rehabilitation. See generally *Police Comm'r of Boston* v. *Municipal Court of the Dorchester Dist.*, Mass. , - , - (1978) (Mass. Adv. Sh. [1978] 685, 699-700, 719-721). In the case of a juvenile defendant, the compulsion of those purposes is strong. In the case of the innocent victim of a sexual assault, the obligation not to aggravate her injuries is very strong indeed.

[11]E.g., J. Bode, Fighting Back, ch. 7 (1978); L. Brodyaga, M. Gates, S. Singer, M. Tucker & R. White, Rape and its Victims: A Report for Citizens, Health Facilities, and Criminal Justice Agencies, chs. 8-9 (1975) (hereinafter LEAA Report); E. Hilberman, The Rape Victim, chs. 2, 7, 8 (1976); L. Holmstrom & A. Burgess, The Victim of Rape, chs. 6-8 (1978); S. Katz & M. Mazur, Understanding the Rape Victim, chs. 12, 14, 15 (1979); J. MacDonald, Rape, 128-130 (1971); C. Bohmer, Judicial Attitudes Toward Rape Victims (D. Chappell, R. Geis & G. Geis eds. 1977); A. Burgess & A. Laszlo, When the Prosecutrix is a Child: The Victim Consultant in Cases of Sexual Assault, in Victims and Society (E. Viano ed. 1976); Libai, The Protection of the Child Victim of a Sexual Offense

has been said that "[t]he court experience, for the rape victim, precipitates as much of a psychological crisis as the rape itself."[12] In fact, the victim may feel that she has been raped twice: once by the defendant and once by the criminal justice system.[13] A rape victim who anticipates humiliation or embarrassment may choose not to come forward at all, or, if she comes forward, may abandon her participation midway through the case.[14] Even if she continues to participate in the criminal process, she may become so distressed that she cannot testify effectively.

This is especially true for the child victim of rape. The child's delicate psyche has few resources to help it withstand the trauma of sexual assault. Furthermore, "[i]t is generally agreed by child psychiatrists that the degree of psychic trauma is as much, or perhaps more, dependent on the way that the child victim is treated after discovery than at the time of the offense itself."[15] Even an adult victim confronted with the criminal justice system is typically "frightened, confused, and reticent."[16] For a child with only the barest understanding of the purposes and procedures of a trial, the act of giving evidence may be particularly difficult and bewildering.[17]

---

in the Criminal Justice System, 15 Wayne L. Rev. 977 (1969); O'Neale, Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution — Or How Many Times Must a Woman be Raped, 18 Santa Clara L. Rev. 119 (1978).

[12] L. Holmstrom & A. Burgess, *supra* note 11 at 229.

[13] J. Bode, Fighting Back, ch. 7 (1978). L. Holmstrom & A. Burgess, *supra* note 11 at 235-236.

[14] S. Katz & M. Mazur, Understanding the Rape Victim, 197-198 (1979).

[15] Libai, *supra* note 11 at 980-981. See E. Hilberman, The Rape Victim, 53 (1976).

[16] LEAA Report at 105.

[17] See A. Burgess & A. Laszlo, *supra* at note 11; C. Bohmer, *supra* note 11 at 166-168. J. MacDonald, Rape, 128 (1971).

One of the most disturbing aspects of the trial for many victims is testifying in public.[18] The victim is often embarrassed to discuss intimate and painful matters before a group of strangers. The victim may also fear that she will be held up to public ridicule. A researcher has described the experience of typical child victims: "[A] child is likely either to be confused and frightened by the presence of many persons, or impressed with this unusual opportunity for enthralling a large audience with his stories. In both cases the public's presence may serve to interfere with the child's powers of recollection and narration. In addition, psychiatrists have observed that 'the victim naturally wishes to avoid publicity, the embarrassment which accompanies questioning by authorities, or courtroom experiences. Children in particular are often profoundly disturbed by this situation.'"[19] Recognizing the problem, judges and commentators have considered clearance of the courtroom during the victim's testimony.[20]

Thus, the purpose of G. L. c. 278, § 16A, is to encourage young victims of sexual offenses to come forward; once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial. See *Commonwealth* v. *Leo*, Mass. , (1979).° In broader terms, the statute's purposes

---

[18] L. Holmstrom & A. Burgess, *supra* note 11 at 227; Libai, *supra* note 11 at 979.

[19] Libai, *supra* note 11 at 1021 (footnote omitted). See E. Hilberman, *supra* note 11 at 53; S. Katz & M. Mazur, *supra* note 11 at 199-200, 233-236.

[20] C. Bohmer, *supra* note 11 at 167. LEAA Report, c. VIII. England and Israel give courts power to exclude the general public when a child victim testifies. Israel, Sweden, and Denmark provide that a court official should question the child privately for the prosecution and defense. See generally Libai, *supra* note 11 at 986-1001; C. Bohmer, *supra* at 167. So, too, a large number of the American States have excluded the public to protect the child victim, either by judicial decision or by statute. See *Cannett Co.* v. *DePasquale*, U.S. at n.19 (99 S. Ct. at 2910 n. 19), for a partial listing of American authority.

° Mass. Adv. Sh. (1979) 2245, 2249.

go beyond protection of juvenile privacy to encompass the State's interest in sound and orderly administration of justice; most important, the statute helps obtain just convictions for the types of crimes from which the victims had often suffered at the hands of the criminal justice system, while their assailants had often gone free. We now construe the statute in light of these purposes.

4. The first question that we must decide is whether the language "At the trial . . . the presiding justice shall exclude the general public" necessarily relates to closure of the entire trial. We have shown the language in question to be ambiguous, and our precedent does not illuminate the point. The legislative history, though equivocal, tends to favor a reading that the statute does not mandate closure of the whole trial. Although the 1931 Special Commission Report speaks of a "private hearing," it does not exclude the possibility that the hearing be private only in part. Moreover, the Report states the purpose of G. L. c. 278, § 16A, as, "[t]o spare girls of juvenile age the embarrassment, humiliation and demoralization of *testifying* . . . incidental to open trial" (emphasis supplied). 1931 House Doc. No. 1200 at 90. In light of the principles favoring publicity, we construe the statute to relate to closure of the trial only during the victim's testimony.[21]

---

[21] The language of G. L. c. 278, § 16C, added by St. 1978, c. 316, more clearly states that the closure order may be for the entire trial or "during those portions of such trial when direct testimony is to be presented." We think this 1978 phrasing not to be inconsistent with the view we take of the earlier analogous statute (§ 16A). The Commonwealth implies that G. L. c. 278, § 16A, mandates closing the entire trial. The Commonwealth goes on to imply that in *Commonwealth* v. *Leo*, Mass. , (1979) (Mass. Adv. Sh. [1979] 2245, 2248-2249), we held that § 16A mandatorily extends the right to a closed trial to the child victim and to her alone. The Commonwealth concludes that the child may make an intelligent and voluntary waiver of her right to full or partial closure. Accordingly, a trial judge should hold a hearing on the waiver issue.

This argument misconceives our holding in *Leo*. We did not say that the victim is the only person who possesses the right to a closed trial. We said that the main purpose of the statute apparently was to protect the

We next consider whether G. L. c. 278, § 16A, requires closure of the trial during the victim's testimony. The Globe argues that the Legislature used the word "shall" in G. L. c. 278, § 16A, in a directory, rather than a mandatory, sense. That is incorrect. Although "[t]he word 'shall' as used in statutes . . . is not of inflexible signification and not infrequently is construed as permissive or directory in order to effectuate a legislative purpose," *Swift* v. *Registrars of Voters of Quincy*, 281 Mass. 271, 276 (1932); see *Myers* v. *Commonwealth*, 363 Mass. 843, 846 (1973), "[t]he word 'shall' . . . is commonly a word of imperative obligation . . . ." *Johnson* v. *District Attorney for the Northern Dist.*, 342 Mass. 212, 215 (1961). "The general rule whereby directions to public officers for the protection of public or private rights are mandatory may be applied in a like manner to directions to courts." C. Sands, Sutherland Statutory Construction § 57.16 at 439 (4th ed. 1973). Thus, the mandatory construction appears preferable. Treating the statute as directory would frustrate its purposes. If she were uncertain whether she would have to testify in public, a young woman might choose not to cooperate with the police and the prosecutor. She might be deterred from coming forward at all.

Furthermore, legislative history is relevant to a determination whether a statute is mandatory or directory, and "[t]he deliberate refusal of the General Court to adopt a word which plainly would have conferred discretionary power . . . [may], in place of one whose natural purport

---

Commonwealth's case by protecting its witnesses. *Id.* at 2249. Therefore, it was clear that the statute did not give a defendant the right to a hearing from which the press was excluded.

The Commonwealth's suggestion would also place the trial court in the awkward position of having to rule on a child's putative waiver of an important right. Use of a waiver doctrine in this context would entail difficult factual determinations and relatively cumbersome procedures (appointment of counsel and in some cases a guardian). It would place a heavy responsibility on even a mature child. It could also import more uncertainty into the process of testifying and make the victim's experience still more taxing.

would compel them . . . [shall], is significant of a settled intention to use the imperative word." *Rea* v. *Aldermen of Everett*, 217 Mass. 427, 431 (1941). Here the Legislature in 1923 sent the Governor a bill, 1923 House Doc. No. 1219, stating that "the court shall exclude the general public. . . ." The Governor returned the bill with amendments including a change from "shall" to "may." In an accompanying message, the Governor said, "A statute giving the presiding judge the discretion to exclude the public . . . ought to be sufficient. . .." 1923 House Doc. No. 1349. The version eventually enacted appears to have been a compromise. It provided that "the presiding justice shall, if said trial is before a district court, or may, if before the superior court, exclude the general public . . .." St. 1923, c. 251. When the Special Commission reviewed the statute in 1931, it stated: "The Commission is very strongly of the opinion that the reasons for a private hearing in such cases, now mandatory in the district courts, are equally compelling in the Superior Court, and the Commission recommends that the above section 16A be amended so that the presiding justice, whether in the Superior or District Court, shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." 1931 House Doc. No. 1200 at 90. The Legislature followed the commission's recommendation. This legislative history leaves little room for doubt that the word "shall" in G. L. c. 278, § 16A, is mandatory as to the victim's testimony.[22]

The Globe contends that it should not be excluded under G. L. c. 278, § 16A, because it is among "such persons as

---

[22] This view is further supported by the language of G. L. c. 278, § 16B (inserted by St. 1949, c. 302), where, as to criminal proceedings in the district court involving husband and wife, it is stated, "[t]he presiding justice . . . may exclude the general public . . . during the trial." General Laws c. 278, § 16C (inserted by St. 1978, c. 316), deals with rape or incest trials and provides that a trial judge "may" exclude "all spectators" on request of the parties and where the defendant waives his right to a public trial in writing. The Legislature clearly knows the difference between the permissive "may" and the mandatory "shall."

may have a direct interest in the case." In *Blondin*, *supra* at 571, the Globe argues, we provided for liberal construction of the clause, and we said: "The intent was to distinguish between persons having a legitimate reason for being present and mere idle spectators who are often attracted in large numbers to sensational trials involving sex issues, not only to the detriment of the community but sometimes to the degradation of justice itself." Because the Globe's reporters have a legitimate reason to attend the trial, a reason unrelated to voyeurism, the Globe argues they have a "direct interest."

We have never said that the "direct interest" clause encompasses the press, and in *Blondin*, *supra* at 572, we expressly reserved the question. We have stated in dictum that the statute does not require exclusion of the defendant's parent, husband, wife, guardian or friend. In *Commonwealth* v. *Marshall*, 356 Mass. 432 (1969), we held that a defendant had a right under G. L. c. 278, § 16A, and the Sixth Amendment to have his mother, brother, sister, and friend present at his trial. However, including a few of the defendant's associates is an entirely different matter from including the press. Admittedly, the presence of a few more persons in the courtroom might not appreciably increase the victim's anxiety about her testimony. But the knowledge that those few extra persons were reporters who might publish her testimony to thousands would probably increase by orders of magnitude her sense of exposure, vulnerability, and alarm. We believe that a policy of admitting the press during young victims' testimony would substantially increase the risk that the Commonwealth would lose the benefit of that testimony.

5. In holding that G. L. c. 278, § 16A, is mandatory only as to the victim's testimony, we do not rule out the possibility that the trial judge might close other parts of the trial. The decision to close any part of the trial other than the victim's testimony or to close the entire trial is a matter within the judge's sound discretion. See *Ottaway Newspapers, Inc.* v. *Appeals Court*, 372 Mass. 539, 546 (1977). Because

the judge's discretion in the context of a criminal trial is well settled, we take this opportunity to provide general guidelines for the exercise of that discretion. See *id.* at 550-552; *Kennedy* v. *District Court of Dukes County*, 356 Mass. 367, 373 (1969). As we understand G. L. c. 278, § 16A, and the common law relating to closure of trials, a judge should hold a hearing before entering an order closing parts of the trial other than the victim's testimony. Although we have not ruled that the plaintiff has a constitutional interest, this view is consistent with the constitutional requirement that a party receive a hearing before suffering a deprivation of such an interest. See *Gannett Co.* v. *DePasquale*, U.S. , - (1979) (Powell, J., concurring);[p] *id.* at (Blackmun, J., dissenting).[q] We take this position because of our expressed view of the significance of society's interest in public trials.

In a case in which G. L. c. 278, § 16A, applies, the Commonwealth may move for closure of parts of the trial other than the victim's testimony or for closure of the entire trial. The issue at the hearing shall be whether such closure is necessary to serve the statutory purpose; i.e., to preserve evidence required for a just conviction. For example, if closing all or part of the trial were necessary to assure the availability of evidence of fresh complaint, see, e.g., *Commonwealth* v. *Gangi*, 243 Mass. 341, 344 (1923); W.B. Leach & P.J. Liacos, Massachusetts Evidence 133 (4th ed. 1967), the judge would be justified in ordering closure. The Commonwealth should bear the burden of showing necessity. Furthermore, because of the policy favoring publicity, an agreement between the prosecution and the defense to close the trial should not justify closure nor even be relevant to the judge's determination of necessity.

At the hearing, any person to be excluded from the trial should have an opportunity to state his objections to the

---

[p] 99 S. Ct. 2898, 2916-2917 (1979).

[q] 99 S. Ct. 2939 (1979).

order.[23] The person need not file a formal motion to intervene. The public need not receive prior notice of the closure hearing. On the other hand, the court should hear a person who in timely fashion informs the court of his desire to object. The hearing should be completed expeditiously and should not ordinarily involve lengthy legal argument. On conclusion of the hearing, the judge should make findings of fact as appropriate and should rule on the necessity for closure.[24]

Since the appeal before us involves an issue now moot, it is to be dismissed.

So ordered.

QUIRICO, J. (dissenting). General Laws c. 278, § 16A, provides in pertinent part as follows: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case." It is undisputed that the criminal trial from which employees of the Boston Globe were excluded was one in which the defendant was being tried on indictments charging him with the crimes of forcible rape and forced unnatural rape on victims who were under eighteen years of age.

---

[23] As we held in *Blondin*, *supra*, and *Marshall*, *supra*, the judge may not exclude certain persons with a "direct interest in the case."

[24] Although a judge might abuse his discretion or make an error of law, such an error would not warrant reversal on statutory grounds if raised on appeal by a defendant. Cf. *Commonwealth* v. *Leo*, Mass. , - (1979) (Mass. Adv. Sh. [1979] 2245, 2247-2249) (G. L. c. 278, § 16A, does not create rights in a defendant). If a defendant should raise at the hearing a constitutional objection to closure, the judge should consider the extent of his constitutional right to a public trial.

In part I of its opinion, the court holds that the word "trial," as used in the phrase "[a]t the trial" at the beginning of § 16A, is ambiguous. The court then discusses several principles of statutory construction as relating to ambiguous language and by the application of those principles to § 16A it concludes that when the Legislature used the word "trial" it intended it to mean only that part of the trial during which the minor victim testifies.

For the reasons stated below, I am unable to agree with that interpretation of § 16A, and I therefore respectfully dissent from the opinion in that regard.

It is clear from the court's opinion that its conclusion that § 16A "is mandatory only as to the victim's testimony" is not based on any holding that the statute is unconstitutional. The court expressly states that it does not reach the constitutional issues raised by the plaintiff. The court limits itself to the process of statutory construction of an assumedly ambiguous statute. For that purpose it resorts to several aids to interpretation, particularly the legislative history of § 16A, as originally enacted in 1923 and amended in 1931, and various articles appearing in law journals and other publications between 1969 and 1978 on the subject of the ordeal of rape victims in court. See note 11 *supra*, of the court's opinion. I likewise limit this dissent to a consideration of statutory construction, and do not reach any constitutional issues.

1. I do not believe that the words "[a]t the trial," as used at the beginning of § 16A, are ambiguous. I believe that they are used in their usual and ordinary sense, and that as such they include all of the trial proceedings starting with the empanelling of the jury and continuing through the return of the verdict or finding. There may be some exceptions thereto, e.g., voir dire hearings held in the absence of the jury to determine the admissibility of evidence, but it is not necessary for the purposes of this case to identify or define such exceptions precisely. In any event I do not believe that the clear language, given its usual and ordinary meaning, permits the drawing of a distinction between that part of the trial during which a youthful victim of a sex

crime testifies and the remainder of the trial during which any other witnesses are testifying.

The language which the Legislature used in § 16A to state its intention to require the exclusion of the general public "at the trial" of persons charged with sex crimes against young victims is not unique to that statute. In G. L. c. 119, § 38, inserted by St. 1954, c. 646, § 1, the Legislature mandated that "[a]ll hearings [of a certain type involving juveniles] shall be closed to the general public. . . ." A similar provision is found in G. L. c. 119, § 65, to the effect that "the court shall exclude the general public from the room" in which hearings are held on certain juvenile matters. General Laws c. 210, § 6, as amended through St. 1971, c. 388, provides that if, at the request of any party, a probate judge determines that an adoption hearing shall be held in chambers, "the probate judge shall exclude the general public from the hearing." Similarly, G. L. c. 278, § 16B, inserted by St. 1949, c. 302, provides that a District Court judge "may exclude the general public from the court room during the trial of any criminal proceeding involving husband and wife." I know of no claim or suggestion that these statutes should be construed to permit the closure of only certain parts of the trials to which they apply; and I know of no instances of the application of such a limitation by our trial courts as a matter of statutory construction.

It is significant to note that when the Legislature did intend to authorize the exclusion of persons from limited portions of a trial it did not use the general language contained in § 16A and other statutes cited above, but rather it chose language expressly authorizing an exclusion limited to prescribed portions of a trial. This is eloquently demonstrated by G. L. c. 278, § 16C, enacted by St. 1978, c. 316, which provides in part: "To protect the parties involved at a trial arising from a complaint or indictment for incest or rape, the trial judge may exclude all spectators from the courtroom in which such trial is being held, or from said courtroom during those portions of such trial when direct testi-

mony is to be presented," provided certain consents by the parties are first obtained.

In my opinion, a comparison of § 16A with the other statutes discussed above requires a conclusion that the Legislature is capable when drafting statutes of using language which clearly expresses its intent to exclude the general public or spectators from trials generally as distinguished from parts of trials, and that it demonstrated this in its choice of the language of § 16A in sharp contrast to that of § 16C. A comparison of those two sections leaves no support for a claim that § 16A is ambiguous as to what is meant by the words "at the trial."

2. If, as I believe, the language of § 16A is not ambiguous, then there is no need or occasion to resort to the legislative history of the statute. While "[i]t is permissible to examine records of legislative proceedings incident to the passage of a statute to illumine its doubtful language . . . its plain meaning cannot be thereby affected . . . ." *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471, 474 (1919). *Old South Ass'n* v. *Boston*, 212 Mass. 299, 304-305 (1912). "The plain meaning of a statute cannot be affected by resort to proceedings incident to its passage. Light may be sought from that source only to illumine statutory language of doubtful import. Other information than that afforded by the words of the statute can be examined only to aid in the solution of an ambiguity. We can only interpret the words of the statute: we cannot speculate as to the probable intention of the Legislature apart from those words." *Allen* v. *Commissioner of Corps. & Taxation*, 272 Mass. 502, 508 (1930).

The case of *D.N. Kelley & Son* v. *Selectmen of Fairhaven*, 294 Mass. 570 (1936), involved the question whether the selectmen were authorized by St. 1926, c. 43, § 1, to give a lease of a town wharf. *Id.* at 571, 574. The plaintiff offered, and the trial judge excluded, evidence that as originally presented to the Governor for signature the bill expressly authorized the selectmen to "lease said property in whole or in part for any purpose," that the Governor returned it with his recommendation that those words be

struck out, and that the bill after having been thus amended was enacted and became a law. *Id.* at 576. The law as enacted said that the selectmen could acquire Union Wharf in their town and that they could "maintain and operate the same as a wharf." *Id.* at 571. This court, in upholding the exclusion of the proffered evidence, said: "The words of the statute as enacted are plain and need no elucidation as to their meaning. The leasing shown by the record and assailed in this proceeding was merely incidental to the main purpose for which the wharf was acquired and in no way has interfered with that purpose." *Id.* at 576 (citation omitted).

In *Milton* v. *Metropolitan Dist. Comm'n*, 342 Mass. 222, 223 (1961), we said: "There is no need to resort to the legislative history of [the statute involved], because its words are unequivocal. Indeed, because of its clarity we should not interpret it by resorting to its legislative history." Accord, *Nichols* v. *Commissioner of Corps. & Taxation*, 314 Mass. 285, 293 (1943); *Boston Consol. Gas Co.* v. *Department of Pub. Utils.*, 321 Mass. 259, 266 (1947).

Since it is my opinion, as already stated above, that the language of § 16A, and particularly the words "at the trial" as used therein, are not ambiguous, I believe that under the doctrine developed in the cases discussed above, nothing in the legislative history can justify a departure from the plain meaning of these words.

In its opinion the court seems to emphasize that the Special Commission which recommended the amendment of § 16A in the manner later enacted as St. 1931, c. 205, said in its report (1931 House Doc. No. 1200 at 90) that the statutory purpose was: "To spare girls of juvenile age the embarrassment, humiliation and demoralization of testifying to all the sordid details of rape, incest, carnal abuse or other crime involving sex, incidental to open trial with examination and cross-examination." At the risk of repetition, it is my view that such emphasis and reliance on the report would be proper if we were dealing with ambiguous statutory language, which I do not believe to be the case. The

Legislature apparently chose language which was broader than that which would have been necessary to accomplish the more limited objective of the Commission. In these circumstances the intention of the Special Commission cannot prevail over the clear and unequivocal, albeit broader, language used by the Legislature in § 16A.

3. If this were a case where, by reason of ambiguous statutory language, we were permitted to resort to extrinsic aids for the interpretation of that language, I would prefer to resort to the aid sanctioned in *Burrage* v. *County of Bristol*, 210 Mass. 299 (1911). That case involved the question whether a statute which authorized "the expenses and costs" of disbarment proceedings meant that such sums were to be paid "as in criminal prosecutions." *Id.* at 300. This court said, *id.* at 301: "It is agreed that the practice has been for many years for the counties to pay for professional services rendered in prosecuting disbarment proceedings. Where the language of a statute is of doubtful import, the contemporaneous construction put upon it by officers thereby charged with performance of public duties is strong evidence of its meaning. The understanding and application of statutory words susceptible of different meanings, through years of practice, and sanctioned by the acquiescence of the Legislature, is significant of the intention with which they were employed originally."[1]

The case of *Swan* v. *Justices of the Superior Court*, 222 Mass. 542 (1916), involved the removal of members of a licensing board under R. L. c. 100, § 4, which provided that such removals were subject to review by the Superior Court

---

[1] In many other cases involving the construction of a statute, this court has used, as an extrinsic aid, the construction given to that statute over a period of years by an administrative agency charged with the enforcement or administration of the statute, sometimes citing the *Burrage* case, *supra*, in support of that practice. See, e.g., *Cleary* v. *Cardullo's Inc.*, 347 Mass. 337, 343-344 (1964); *Mullen* v. *Board of Sewer Comm'rs*, 280 Mass. 531, 536 (1932); *Allen* v. *Commissioner of Corps. & Taxation*, 272 Mass. 502, 509 (1930); *United States Trust Co.* v. *Commonwealth*, 245 Mass. 75, 80 (1923); *Tyler* v. *Treasurer & Receiver Gen.*, 226 Mass. 306, 310 (1917).

and that "there shall be no appeal" from the decision of the court. *Id.* at 543. The issue was whether, notwithstanding the quoted language, the decision could be reviewed under a petition for a writ of certiorari, as had been done for many years, pursuant to R. L. c. 156, § 3, and R. L. c. 192, § 4, authorizing this court "to correct and prevent errors and abuses [in proceedings of trial courts] if no other remedy is expressly provided." In holding that the latter statutes prevailed, this court noted that the Superior Court had universally followed a practice in accord with those statutes, and said, "[t]he understanding and application of statutory words through years of practice by those charged with heavy official responsibility to interpret them aright, sanctioned by the acquiescence of the Legislature, is persuasive, although not conclusive, as to their correct meaning." *Id.* at 547.

If we were to resort to extrinsic aids for the interpretation of G. L. c. 278, § 16A, on the assumption that its language is ambiguous, I believe that the aid illustrated in the *Burrage* and *Swan* cases, *supra*, would support the conclusion that § 16A is not to be interpreted as narrowly as is done in this court's opinion in the present case. The court holds today that since 1931, § 16A became mandatory by reason of the amendment[1] substituting the mandatory word "shall" for the directory word "may." I believe it is proper for us to take judicial notice of the fact that almost all Superior Court judges who have had occasion to apply the statute since 1931 have proceeded on the basis that it required closure of the entire trial. I know of no instance in which a judge who made a more limited application of § 16A did so on the basis of the interpretation this day given to it by this court.

I believe that it is also proper to take notice (a) that in the past several years there has been an increase in aggressive, and perhaps concerted, action by the press in claiming a constitutional right to be present at trials which are subject to § 16A; and (b) that some judges of the Superior Court,

---

[1] St. 1931, c. 205.

but very few, have either yielded to or attempted to accommodate that pressure by admitting the press under special conditions, guidelines or restraints. See *Commonwealth* v. *Leo*, Mass. , - (1979).[a] Whatever the motivation or reason for this departure from the previous universal application of § 16A to the entire trial, there is no indication that it was due to any concept that the Legislature had intended the closure to be limited to the time when the youthful victim testified. Indeed, the departure as applied in the *Leo* case, *supra*, did not take the form of the closure of a particular part of the trial. If the departure was due to constitutional considerations, it does not detract from the significance of the fact that for almost fifty years the judges of the Superior Court have treated § 16A as applying to the entire trial. That fact, while not conclusive, is in my opinion persuasive against the limitation which this court now places on the statute.

4. Although the court does not decide the constitutional issues raised by the plaintiff, their presence is a factor in the limitation which it places on § 16A. The court expressly notes the presence of these issues and says that in view thereof, and of "the United States Supreme Court's uncertain posture on the issues, [citing the *Richmond Newspapers, Inc.*, and the *Gannett Co.* cases] we seek to shrink the region of possible constitutional doubts about G. L. c. 278, § 16A." It does this in the application of the principle that a "statute must be construed, if fairly possible so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

The *Richmond Newspapers, Inc.*, case has not been argued before the United States Supreme Court. In my opinion if the decision in that case or any other decision hereafter by a court enjoying supremacy in this area mandates the truncation of G. L. c. 278, § 16A, so that it applies only to the time when the minor victim testifies, there will be time enough for this court so to limit it. On the other hand,

---

[a] Mass. Adv. Sh. (1979) 2245, 2246-2249.

if it becomes apparent from future controlling decisions that the truncation now declared by this court was not constitutionally required, the present holding probably cannot effectively be reversed except by new legislation.

Until there is a controlling decision on this subject by the United States Supreme Court, I do not believe that the concern expressed and protection provided by the Legislature for minor victims of sex crimes by the language of G. L. c. 278, § 16A, should be stripped from them by judicial action. The mere specter of a decision yet to be issued by the United States Supreme Court should not be a factor contributing to judicial retreat and discontinued enforcement of the legislative mandate contained in § 16A.

Supreme Court of the United States

No. 79-1862

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

SUPERIOR COURT FOR THE COUNTY OF NORFOLK,
APPELLEE.

APPEAL from the Supreme Judicial Court of Massachusetts.

THIS CAUSE having been submitted on the statement of jurisdiction and motion to dismiss.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause be vacated with costs, and that this cause be remanded to the Supreme Judicial Court of Massachusetts for further consideration in light of *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. (1980).

IT IS FURTHER ORDERED that the appellant, Globe Newspaper Company, recover from Superior Court for the County of Norfolk One Hundred Dollars ($100) for its costs herein expended.

October 14, 1980

Clerk's costs: $100.00

COMMONWEALTH OF MASSACHUSETTS.

Supreme Judicial Court for the Commonwealth,
At Boston June 30, 1981.

In the case No. SJC-1825

GLOBE NEWSPAPER COMPANY

vs.

SUPERIOR COURT

pending in the Supreme Judicial Court for the County of Suffolk No. 79-191 CIVIL.

ORDERED, that the following entry be made in the docket; viz., —

Appeal dismissed.

By the Court,

s/Patrick J. Hurley, Clerk.

June 30, 1981
See opinion on file.

GLOBE NEWSPAPER CO. *vs.* SUPERIOR COURT.

Suffolk. March 2, 1981. — June 30, 1981.

Present: HENNESSEY, C.J., WILKINS, LIACOS, ABRAMS, & NOLAN, JJ.

CIVIL ACTION commenced in the Supreme Judicial Court for the county of Suffolk on April 25, 1979.

The case was heard by *Braucher*, J.

After review by the full court and appeal to the Supreme Court of the United States, the case was remanded by that Court for further consideration.

James F. McHugh (*Jane E. Serene* with him) for Globe Newspaper Company.

Mitchell J. Sikora, Jr., Assistant Attorney General (*Alan B. Sherr*, Assistant Attorney General, with him) for the defendant.

James C. Heigham for the Massachusetts Newspaper Publishers Association, amicus curiae, submitted a brief.

LIACOS, J. This case is before us on remand from the United States Supreme Court, *Globe Newspaper Co.* v. *Superior Court*, U.S. (1980).[a] The order of the Supreme Court vacated the judgment in *Globe Newspaper Co.* v. *Superior Court*, Mass. (1980)[b] (*Globe I*). The Court remanded the cause for further consideration by this court in light of *Richmond Newspapers, Inc.* v. *Virginia*, U.S. (1980).[c] In *Richmond Newspapers*, the Supreme Court recognized for the first time that the First Amendment to the United States Constitution guarantees a right of public access to criminal trials. We hold that G. L.

---

[a] 101 S. Ct. 259 (1980).

[b] Mass. Adv. Sh. (1980) 485.

[c] 100 S. Ct. 2814 (1980).

c. 278, § 16A, as construed in *Globe I*, is constitutional under the First Amendment to the Federal Constitution.

The underlying facts of this case are set forth in detail in our original opinion,[1] but for the sake of clarity we provide a brief summary. In mid-April of 1979, preliminary motions were argued in the case of Commonwealth vs. Albert Aladjem, Norfolk Superior Court, No. 73102-9. Aladjem was accused of forcible rape and forced unnatural rape. Three complaining witnesses were involved, all minors, two sixteen and one seventeen years of age at the time of trial. The presiding judge ordered the hearings on preliminary motions closed to the public and press, and the prohibition continued throughout the entire trial. A jury verdict of not guilty was delivered on May 10, 1979. The closure order, issued without hearing,[2] was based on the conclusion of the trial judge that G. L. c. 278, § 16A, required such action. The statute in relevant part reads as follows: "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case."

Following the action of the Superior Court judge, the plaintiff, Globe Newspaper Company (Globe), sought from a single justice of this court, an order permitting members of the press to attend the trial and related proceedings. G. L. c. 211, § 3. After hearing the parties, the single justice

---

[1] The facts are as stated in the initial petition of the plaintiff. They were not disputed by the defendant and have been accepted as accurate throughout the various proceedings in this case.

[2] The Globe sought to intervene but its request was denied.

denied the relief sought. The Globe appealed to the full court. In that appeal, the Globe raised statutory and constitutional claims. We held that the case was moot, since the criminal trial already had ended in acquittal. We declined, for a number of reasons, to reach the constitutional issues raised by the Globe.[3] Still, recognizing that the issue before us was one capable of repetition yet evading review, the opinion did delineate our view as to the proper interpretation of G. L. c. 278, § 16A. We held that the statute mandated closure only during the testimony of minor complainants. We also indicated that requests to exclude the public from additional segments of a trial were matters to be considered within the sound discretion of the trial judge. We suggested that a judge should consider whether closure was necessary to protect the State's interest in preserving evidence and obtaining just convictions; such a request should be granted only after a hearing where any person to be excluded, including representatives of the press, could be heard.

The Globe now claims that *Richmond Newspapers* dictates a different result. No party contests that there are instances where a minor victim may be psychologically unable to testify if confronted with a large group of spectators or if the minor is aware that what is being said will become a matter of wide public knowledge. But in the plaintiff's view such a determination can be constitutional only if

---

[3] The plaintiff in *Globe Newspaper Co.* v. *Superior Court*, Mass. (1980) (*Globe I*) (Mass. Adv. Sh. [1980] 485), failed to fully brief or argue any claim based on art. 16 of the Declaration of Rights of the Massachusetts Constitution and thus we did not consider this contention. The pendency of a decision in *Richmond Newspapers, Inc.* v. *Virginia*, U.S. (1980) (100 S. Ct. 2814 [1980]), and the uncertainty engendered by *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979), were among the reasons that led us to refrain from reaching the Federal constitutional issues.

made in a case-by-case manner after a hearing has been held at which interested parties (the Commonwealth, the defendant, members of the public, including the press) have presented evidence. The automatic closing of a minor victim's testimony would thus be prohibited. Additionally, the plaintiff challenges the standards set forth in *Globe I* for the closing of other portions of such trials, arguing that adequate weight was not given in this court to the interests of the press and public.

The plaintiff predicates its argument on its own rights under the First Amendment, as applied to the States by the Fourteenth Amendment. See, e.g., *Fiske* v. *Kansas*, 274 U.S. 380 (1927) (freedom of speech); *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (freedom of the press); *De-Jonge* v. *Oregon*, 299 U.S. 353 (1937) (freedom of assembly).[4] The Globe also suggests that it should be allowed to assert the Sixth Amendment rights of Aladjem, who was the defendant in the underlying criminal prosecution, and who opposed the closing of the trial to the press and public. Cf. *In re Oliver*, 333 U.S. 257 (1948) (right to public trial). In *Globe I*, we rejected this proposition since the accused, hav-

---

[4]The defendant points out, with some justification, that the only issue technically before us on remand may be whether the plaintiff's claims were indeed moot in the initial proceeding. If the answer is yes, as a matter of Federal constitutional law, there is no need for us to resolve the plaintiff's substantive contentions. Indeed there is some debate over the propriety of a State court resolving a Federal claim in such circumstances. See L. Tribe, American Constitutional Law § 3-18 at 81 (1978). However, both in *Gannett Co.* v. *DePasquale*, *supra*, and *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, the Supreme Court considered claims by news organizations arising from the closing of trials or pretrial sessions in cases that had long since concluded. We pointed out in *Globe I*, *supra* at (Mass. Adv. Sh. [1980] at 486), that the case before us was one "capable of repetition yet evading review," citing *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911). In light of these considerations, and of the mandate implicit in the remand of the Supreme Court to this court, we conclude that the case is not moot as to the First Amendment issues.

ing objected to the closure order, chose not to pursue the claim after acquittal. We continue to believe that these personal rights, at least in the context of this case, can only be asserted by the original criminal defendant.[5]

A resolution of the issues raised by the plaintiff requires a close reading of *Richmond Newspapers*. The question facing the Supreme Court was whether the public and press possess a constitutional right to attend criminal trials. *Id.* at [d] (plurality opinion).[6] A trial judge in a small Virginia

---

[5] The plaintiff finds authority for its contention in those decisions of the United States Supreme Court that have allowed a third party to assert the rights of individuals not before the court. See, e.g., *Eisenstadt* v. *Baird*, 405 U.S. 438, 445-446 (1972); *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965). The weakness of this argument however is that *Griswold* pointed to the existence of a "professional relationship" between the party before the court and the individuals whose rights were asserted. In *Eisenstadt*, a somewhat similar relationship was present as well as a situation where a finding against the party before the court would have significantly impaired the right of the absent parties to later assert their rights. *Id.* at 446. So, too, in cases where third-party standing has been allowed, there generally has not been a single individual whose interests are purportedly being protected but rather some group, if not a certified class. When the absent party, as here, is an identified individual fully competent to protect his rights, there is little reason to allow surrogate standing. See *Gilmore* v. *Utah*, 429 U.S. 1012, 1017 (1976) (Stevens, J., concurring) (order dismissing stay of execution); Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv. L. Rev. 297, 310-315 (1979).

We note also that the various opinions in *Richmond Newspapers* are based on the First Amendment, not the Sixth Amendment. Hence, we consider the mandate in the remand to require us to consider First Amendment issues only.

[d] 100 S. Ct. at 2818 (1980).

[6] The precise basis of the Supreme Court's decision in *Richmond Newspapers, Inc.* v. *Virginia*, U.S. (1980) (100 S. Ct. 2814 [1980]), is somewhat unclear. It appears the Sixth Amendment right to a public trial was not relied upon (see note 5 *supra*), and that the essential underpinnings of the decision are found in the First Amendment. The difficulties of interpretation are expressed by Justice Blackmun, concurring in the judgment: "The Court, however, has eschewed the Sixth Amendment route. The plurality turns to other possible constitutional sources and invokes a veritable potpourri of them — the speech clause of the First

community had excluded both press and public from the third retrial of a murder case. The closing, on motion by the defense attorney and without objection from the prosecution, was ordered without a hearing on the basis of a statute that placed discretionary authority in the hands of the judge.[7]

The Chief Justice and six Justices agreed that the decision to close was improper. Although there was no majority opinion,[8] two themes were stressed by all. The unbroken common law history of open trials was central in the plurality opinion of Chief Justice Burger, joined by Justices White and Stevens. *Id.* at - .[e] While such a tradition alone does not create a constitutional right in the public and press to attend trials, it was viewed by these Justices in conjunction with the First Amendment's "core purpose of assuring freedom of communication on matters relating to the functioning of government." *Id.* at .[f] The Chief Justice

---

Amendment, the press clause, the assembly clause, the Ninth Amendment, and a cluster of penumbral guarantees recognized in past decisions. This course is troublesome, but it is the route that has been selected and, at least for now, we must live with it. No purpose would be served by my spelling out at length here the reasons for my saying that the course is troublesome. I need do no more than observe that uncertainty marks the nature — and strictness — of the standard of closure the Court adopts." *Id.* at (100 S. Ct. at 2842 [1980]).

[7] The plurality considered the challenge to be aimed at the manner in which the trial judge exercised his discretion rather than at the statute itself (Va. Code § 19.2-266 [1975]). *Id.* at n.4 (100 S. Ct. at 2820 n.4 [1980]). Justice Brennan, joined by Justice Marshall, would have held the statute itself unconstitutional since it conferred unfettered discretion. *Id.* at (100 S. Ct. at 2839 [1980]).

[8] There is some difficulty in determining the binding rule of law in a decision which lacks reasoning to which a majority of the Court has agreed. See Note, Plurality Decisions and Judicial Decisionmaking, 94 Harv. L. Rev. 1127 (1981); Note, The Precedential Valve of Supreme Court Plurality Decisions, 80 Colum. L. Rev. 756 (1980).

[e] 100 S. Ct. at 2821-2826 (1980).

[f] 100 S. Ct. at 2827 (1980).

found it "difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Id.* The plurality opinion describes an open court room as akin to a public forum protected by freedom of assembly, *id.* at ,[g] and as a critical source of information about the functioning of government, *id.* at .[h] This concern with the history of unimpeded access was shared by Justice Blackmun, although he would have found the locus of the public right in the open trial provisions of the Sixth Amendment. *Id.* at - .[i] Justice Stewart also adopted the historical analysis, emphasizing in particular the concept of the public forum. *Id.* at .[j]

Justice Brennan, joined by Justice Marshall, accepted the importance of tradition, *id.* at - ,[k] but placed more emphasis on the structural role of the First Amendment in ensuring public access to information necessary for self-government. *Id.* at - .[l] Justice Stevens shared this position in a separate concurrence, expressing the belief that the major significance of the decision was that the First Amendment was now recognized as creating some affirmative right of access to information in the hands of the government. *Id.* at .[m]

All the members of the Court voting for reversal[o] indicated that there were circumstances where the closing of

---

[g] 100 S. Ct. at 2828 (1980).

[h] 100 S. Ct. at 2827 (1980).

[i] 100 S. Ct. at 2841-2842 (1980).

[j] 100 S. Ct. at 2840 (1980).

[k] 100 S. Ct. at 2834-2835 (1980).

[l] 100 S. Ct. at 2837-2839 (1980).

[m] 100 S. Ct. at 2831 (1980).

[o] Justice Powell took no part in the Court's decision. Justice Rehnquist dissented.

portions of a trial would be justified. Less clear are the particular instances. There is also little direction about the level of opposing interests necessary to exclude the press and public. The Globe points to a passage in the plurality opinion, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public," *id.* at . [n] However, attached to that statement is a footnote in which the plurality disavows any attempt to define the exact circumstances in which trials may be closed.[10]

Justice Brennan's concurrence cautions that a right to governmental information is not absolute but rather subject to "a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality," *id.* at . [o] Justice Stewart specifically pointed to the "sensibilities of a youthful prosecution witness" in a rape

---

[n] 100 S. Ct. at 2830 (1980).

[10] See *Richmond Newspapers*, *supra* at n.18 (100 S. Ct. at 2830 n.18 [1980]). The footnote acknowledges that some situations have in the past been seen as justifying the closing of a trial. The Court referred to 6 J. Wigmore, Evidence § 1835 (Chadbourn rev. 1976), and stated that the Court's holding "does not mean that the First Amendment rights of the public and representatives of the press are absolute." Justices Brennan and Marshall, concurring, also recognized that "countervailing interests" might be sufficient to reverse the presumption favoring open trials. *Id.* at & n.24 (100 S. Ct. at 2839 & n.24 [1980]). That the First Amendment is not an absolute bar to closure was also recognized by Justice Stewart, concurring, *id.* at - & n.5 (100 S. Ct. at 2840-2841 & n.5 [1980]). Cf. *id.* at (Rehnquist, J., dissenting) (100 S. Ct. at 2843 [1980]). It seems significant to us that Wigmore states in § 1835 that: "The danger of overcrowding, the risk of violence or brawls, the moral harm of satisfying pruriency in trials of certain crimes — these are the ordinary grounds for exclusion. It cannot be doubted that such exceptions are within the judicial power to allow.

"By statute in most states they are expressly sanctioned, either in general terms, or for *special classes of cases*, such as divorce, rape, and the like, or for *special classes of persons*, such as minors" (emphasis in original). J. Wigmore, *supra* at 443-445.

[o] 100 S. Ct. at 2833 (1980).

case as an example of a circumstance which might justify the exclusion of the general public. *Id.* at - n.5.[p]

To test the mandatory closing requirement of G. L. c. 278, § 16A, against the standard of *Richmond Newspapers* requires a threefold inquiry: (1) Does the closing of the testimony of the minor victim of a sexual assault[11] violate the same tradition of open proceedings as the closing of an entire murder trial; (2) to what extent does the restriction impede the flow of information necessary to the functioning of democratic institutions; (3) are there substantial State interests underlying the statute, and if there are, can they be furthered by more tightly drawn regulations that will intrude to a lesser degree on the constitutionally protected interests of the press and public?

As already discussed, the constitutional right of access to trials arises in part from an unbroken tradition of openness. See *Globe I, supra* at - .[q] The thrust of the separate opinions in *Richmond Newspapers* is not that the ability or inability of a judge to close a proceeding in 1791 was enshrined unchanging in the Constitution. Rather the vital role of public proceedings in providing information about the operation of government, with a corresponding right to this "public forum," has developed over time. This tradition of open trials long has been a part of the common law of this Commonwealth, and we took cognizance of it in *Globe I.* There is at least one notable exception to this history. In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult. See, e.g., *United States ex rel.*

---

[p] 100 S. Ct. at 2840-2841 n.5 (1980).

[11] We consider here only the crimes within the scope of G. L. c. 278, § 16A, involved in the trial of Aladjem.

[q] Mass. Adv. Sh. (1980) at 494-496.

Latimore v. *Sielaff*, 561 F.2d 691 passim (7th Cir. 1977), cert. denied, 434 U.S. 1076 (1978) (court closed to the public during testimony of twenty-one year old rape victim [press allowed to remain]); *Harris* v. *Stephens*, 361 F.2d 888, 891 (8th Cir. 1966), cert. denied sub nom. *Harris* v. *Bishop*, 386 U.S. 964 (1967) (closing of rape trial to the public during testimony of twenty-three year old victim); *Benedict* v. *People*, 23 Colo. 126, 128-129 (1896) (in a trial for sodomy, judge properly excluded the general public); *Douglas* v. *State*, 328 So. 2d 18, 20-21 (Fla.), cert. denied, 429 U.S. 871 (1976) (court closed to general public during witness's testimony concerning forced sex acts [press allowed to remain]); *State* v. *Callahan*, 100 Minn. 63, 69 (1907) (upholding clearing of court room of spectators when rape victim found it difficult to testify in front of a large crowd); *Price* v. *State*, 496 S.W.2d 103, 107-108 (Tex. Crim. App. 1973) (court cleared during testimony of rape victim [representative of press allowed to remain]). But see, e.g., *Tanksley* v. *United States*, 145 F.2d 58 (9th Cir. 1944) (reversing trial court decision barring public [but not the press] from an entire trial involving a nineteen year old rape victim); *People* v. *Byrnes*, 84 Cal. App. 2d 72, cert. denied, 335 U.S. 847 (1948) (reversing conviction of rape when public was excluded from entire trial); *State* v. *Schmit*, 273 Minn. 78 (1966).

To the extent such closings were justified as an attempt to protect the public from offensive information, see *Douglas* v. *State*, *supra*, such rulings can hardly survive the rationale of *Richmond Newspapers*. More typically, however, the motivation has been overcoming the difficulty the victim may have in publicly testifying about the details of crimes which are, short of homicide, the "ultimate violation of self." *Coker* v. *Georgia*, 433 U.S. 584, 597 (1977) (plurality opinion). Accord, *State* v. *Callahan*, *supra*; *Price* v. *State*,

supra. A part of this willingness to close testimony of the victim of a sexual assault is for the "protection of the personal dignity of the complaining witness." *United States ex rel. Latimore* v. *Sielaff*, *supra* at 694.

Historically there has been a recognition that significant interests are at stake in a trial involving a sexual assault, interests that may outweigh the public's right to unfettered access to the trial.[12] Disputes have concerned the extent of closings or the justification in a particular fact situation. See *id.* at 694-696. Whatever the disagreement among the courts about specific closure orders, it is clear that the majority of the courts have upheld decisions to close parts of trials when a minor victim of a sexual assault is testifying. *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 388 n.19 (1979). *Geise* v. *United States*, 262 F.2d 151 (9th Cir. 1958), cert. denied, 361 U.S. 842 (1959). *Hogan* v. *State*, 191 Ark. 437 (1935). *State* v. *Nyhus*, 19 N.D. 326 (1909). But see *Lexington Herald Leader Co.* v. *Tackett*, 601 S.W.2d 905 (Ky. 1980). While this tradition alone does not answer the plaintiff's claim, it shows widespread recognition that legitimate and significant interests in closing at least portions of trials for sexual assaults do exist.

General Laws c. 278, § 16A, as interpreted in *Globe I*, limits immediate public observance of a particular kind of testimony. The court room testimony of minors who are the victims of sexual assault cannot be subject to contemporary reporting by members of the press. When the victim is an adult the trial is not automatically closed.[13] The

---

[12] The multitude of jurisdictions which specifically authorize courts to close proceedings involving sexual assaults strengthens this perception. See, e.g., Ala. Code tit. 12, § 12-21-202 (1975); N.Y. Jud. Law § 4 (McKinney) (1975); N.C. Gen. Stat. § 15-166 (1975).

[13] General Laws c. 278, § 16C, authorizes the exclusion of the general public from trials involving incest or rape, even when the victim is an adult. We need not here pass on the particular applications of that

public will therefore be able generally to observe the judicial system dealing with charges involving sexual assault. The Legislature has chosen, however, to treat the testimony of minors in a different way by requiring closure of the trial at the time the minor testifies.[14] The question we must resolve is whether the genuine State interests furthered by the statute justify this impact on First Amendment interests. In *Globe I* we identified the State interests furthered by G. L. c. 278, § 16A, to be, (a) to encourage minor victims to come forward to institute complaints and give testimony (*id.* at [r]); (b) to protect minor victims of certain sex crimes from public degradation, humiliation, demoralization, and psychological damage (*id.* at - [s]); (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment (*id.* at [t]); (d) to promote the sound and orderly administration of justice (*id.* at [u]); (e) to preserve evidence and obtain just convictions (*id.* at , [v]).

The plaintiff does not deny that significant State interests may warrant closure of a trial; it argues, however, that such interests cannot be furthered by legislative mandate. The

---

statute except to point out that it is discretionary, and we expect that trial judges will interpret it in light of *Globe I*, this opinion, and *Richmond Newspapers*.

[14] We note that G. L. c. 278, § 16A, is silent as to the question of transcripts of such testimony being made available to the press; nor did we discuss this question in *Globe I*. We need not resolve that issue here, but leave the question to the sound discretion of trial judges in light of our discussion in *Globe I* and this opinion, and, of course, in light of *Richmond Newspapers*.

[r] Mass. Adv. Sh. (1980) at 496.

[s] Mass. Adv. Sh. (1980) at 496-498.

[t] Mass. Adv. Sh. (1980) at 499.

[u] Mass. Adv. Sh. (1980) at 500.

[v] Mass. Adv. Sh. (1980) at 500, 503.

plaintiff says that a balancing of State interests against First Amendment rights is permissible only if undertaken on a case-by-case basis. We do not agree. We perceive no such holding in *Richmond Newspapers*. We believe that the Legislature, a coordinate branch of government, has power to act. We note additionally that, by their very nature, these substantial State interests would be defeated if a case-by-case determination were used. Ascertaining the susceptibility of an individual victim might require expert testimony and would be a cumbersome process at best. Only the most exceptional minor would be sanguine about the possibility that the details of an attack may become public. An examiner would have to distinguish between natural hesitancy and cases of particular vulnerability. To the extent that such a hearing is effective, requiring various psychological examinations in some depth, the victim will be forced to relive the experience.[15] So, too, the families of youthful victims will be uncertain whether the reporting of a sexual assault will expose a child to additional trauma caused by the preliminary hearing as well as to public testimony at the trial. Implicit also in the Globe's argument is that a State Legislature is without power to act to protect

---

[15] The plaintiff's suggestion at oral argument that a case-by-case approach to determine psychological vulnerability would require press participation in the resolution of this question makes the point more dramatic. As envisioned by the plaintiff, the press should be allowed to participate and to present evidence. To adopt such a view would lead not only to a side trial in addition to the criminal trial, but a trial in which the victim would be the focus of conflicting psychiatric testimony and perhaps examination and cross-examination. We can perceive no procedure more damaging to the well-being of the child; nor one better designed to inhibit criminal complaints and convictions in such cases. For the same reasons, a waiver provision would be inappropriate. To determine whether the witness's decision to testify in public was knowing would require the same kind of potentially damaging inquiry. See *Globe I*, *supra* at n.21 (Mass. Adv. Sh. [1980] at 500 n.21), for additional reasons which make a theory of waiver inappropriate.

substantial State interests in the context of such trials. We do not believe *Richmond Newspapers* goes that far (see note 7 *supra*) and we are not disposed to reach such a conclusion.

Next, the plaintiff contends that even if legitimate ends are in part served by G. L. c. 278, § 16A, the statute is "underinclusive" and hence must fall. Cf. *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 104-105 (1979); *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 214-215 (1975). It is true that an attempt possibly could be made to give more complete protection to minor victims of sexual assaults. The statute as it stands is only a partial solution since the names of the victims are not part of a closed record. However, G. L. c. 278, § 16A, is aimed at balancing the defendant's Sixth Amendment rights, see generally *Commonwealth* v. *Marshall*, 356 Mass. 432, 435 (1969), and the public's right to know under the First Amendment, against the minor victim's right to minimal harm in the process of testifying, and the Commonwealth's substantial interests as outlined herein. In this light, the statute cannot be said to be fatally underinclusive.

An additional factor that supports the challenged closing is the specific State interest in protecting minors. As we pointed out in *Globe I*, *supra* at [w] "This legislative history reveals that G. L. c. 278, § 16A, stands at the nexus of two overlapping strands of policy; the Legislature wished to shield certain victims of sex crimes from the difficult experience of testifying in public; and the Legislature joined this solicitude for victims with the broad, paternal protection afforded children generally" (footnotes omitted). This well-established State interest does not overwhelm all other constitutional concerns. There is no doubt that once a news organization legitimately obtains information concerning a

---

[w] Mass. Adv. Sh. (1980) at 497.

juvenile offender or victim, the State may not penalize the publication of such information. *Smith* v. *Daily Mail Publishing Co.*, *supra* at 104. *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308 (1977). *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 495 (1975). Similarly, by virtue of the Sixth Amendment, a defendant cannot be prevented from confronting a witness with prior offenses merely because the adjudication of guilt occurred in a juvenile proceeding. *Davis* v. *Alaska*, 415 U.S. 308, 319 (1974). Yet in both the juvenile justice system and in the Commonwealth's dealings with the problem of neglected or abused children there is a clear recognition that the State may act in a manner that otherwise would be forbidden because of a special solicitousness for the interests of minors. See, e.g., *Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption*, Mass. , (1981);[x] *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 545-549 (1971) (plurality opinion). We are given no authority indicating that a State may not close juvenile delinquency proceedings to protect allegedly delinquent juveniles from stigmatization and to further State interests in the rehabilitation of juveniles.[16] General Laws c. 278, § 16A, must be viewed as part of the same scheme. *Globe I*, *supra* at .[y] It would be anomalous indeed if a State Legislature could protect juvenile offenders by closed hearings but was deemed to lack the power to protect juvenile victims of crime. We do not believe that *Richmond Newspapers* dictates such an anomalous result.

The statute, as it affects the testimony of minor victims, is fairly characterized as an attempt to reduce possible harm

---

[x] Mass. Adv. Sh. (1981) 1157, 1172.

[16] See statute and authorities cited in *Globe I*, *supra* at n.10 (Mass. Adv. Sh. [1980] at 497 n.10).

[y] Mass. Adv. Sh. (1980) at 497.

to a vulnerable group of individuals. Both precedent and empirical research support the Commonwealth's position that this concern is genuine and well-founded. *Globe I, supra* at - .[z] Logic and history indicate that the method chosen by the State will further this goal, while making increased reporting of sexual assaults more likely.

Balanced against this must be the impact that the closing of this testimony has on the public's knowledge about these trials. Although there is some temporary diminution of information, we cannot say that *Richmond Newspapers* requires the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims.

The plaintiff also challenges the standards set forth in *Globe I* for the closing of additional portions of a trial involving a sexual assault on a minor victim. We required that a hearing be held at which all interested parties could appear. *Globe I, supra* at - .[aa] Certainly a trial judge in such a hearing is now obliged to recognize the constitutional right of the press and public to attend trials. The justification for such exclusion must comply with the standards of *Richmond Newspapers*. We decline, however, at this point, to go further in articulating the requirements of the First Amendment. Our opinion in *Globe I* made clear that the closing of the entire trial in this instance was improper since no hearing was conducted. Having made such a determination on the basis of the statute, there is no need to reach additional, constitutional issues. See *Fazio* v. *Fazio*, 375 Mass. 394, 405 (1978); *Commonwealth* v. *Bartlett*, 374 Mass. 744, 748-749 (1978).

---

[z] Mass. Adv. Sh. (1980) at 497-500.

[aa] Mass. Adv. Sh. (1980) at 504-505.

Accordingly, we conclude that the opinion of this court in *Globe I* is valid, and we dismiss the appeal before us.

So ordered.

WILKINS, J. (concurring). I agree with most of what the court has said. *Richmond Newspapers, Inc.* v. *Virginia*, U.S. (1980),[a] did not involve the closing of a trial, or a portion of a trial, which involved a minor victim of a sex crime. Various Justices noted that the right to a public trial was not absolute, recognizing that overriding or countervailing interests might overcome the general principle that a criminal trial must be open to the public.[1] We have no guidance yet on whether the mandatory closing of all criminal trials during the testimony of minor victims of sex crimes is permissible under the First Amendment. Justice Stewart recognized that "the sensibilities of a youthful prosecution witness, for example, might justify similar exclusion [at least from some segments of a trial] in a criminal trial for rape, so long as the defendant's Sixth Amendment right to a public trial were not impaired." *Id.* at - n.5.[b]

I am not certain that the mandatory closing of the trial of a case involving a minor victim of a sex crime during his or her testimony, as the court directs, is constitutionally permissible without specific findings by the judge that the clos-

---

[a] 100 S. Ct. 2814 (1980).

[1] See *Richmond Newspapers, Inc.* v. *Virginia*, U.S. (1980) (Chief Justice Burger, joined by Justice White and Justice Stevens) (100 S. Ct. 2814, 2830 [1980]); *id.* at (Justice Brennan, concurring, joined by Justice Marshall) (100 S. Ct. at 2839 [1980]); *id.* at - n.5 (Justice Stewart, concurring) (100 S. Ct. at 2840-2841 n.5 [1980]).

[b] 100 S. Ct. at 2840-2841 n.5 (1980).

ing is justified by overriding or countervailing interests of the Commonwealth. I question whether the findings, imputed to the Legislature, in support of closing such trials can alone justify closing a portion of all such trials. The applicability of these imputed legislative findings in each case is not assured. If, for example, the minor victim did not object to the trial being public during his or her testimony and the defendant wanted the entire trial to be public, or, to make the case perhaps even stronger, if the minor victim wanted the public to know precisely what a heinous crime the defendant had committed, the imputed legislative justifications for requiring the closing of the trial during the victim's testimony would in part, at least, be inapplicable. In such a case, the reasons for closing a portion of the trial would be far less persuasive than in a case in which the victim wanted the trial closed during his or her testimony. I would require specific findings in each case before a trial may be closed during the testimony of a minor victim of a sex crime and would not foreclose the trial judge from concluding, on proper findings, that a trial should be entirely public.

SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

CIVIL No. 1825

GLOBE NEWSPAPER COMPANY,
APPELLANT

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE

Notice of Appeal to The Supreme Court of the United States

Notice is hereby given that Globe Newspaper Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts of June 30, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

JAMES F. MCHUGH
MARC A. REARDON
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300
Counsel for Appellant

Date: September 22, 1981

[Certificate of Service Omitted]

SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPREME JUDICIAL COURT
CIVIL ACTION
No. 79-191

GLOBE NEWSPAPER COMPANY,
APPELLANT

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE

Notice of Appeal to The Supreme Court of the United States

Notice is hereby given that Globe Newspaper Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts of June 30, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

JAMES F. MCHUGH
MARC A. REARDON
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300
Counsel for Appellant

Date: September 22, 1981

[Certificate of Service Omitted]

SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPREME JUDICIAL COURT
CRIMINAL ACTION
No. 73102-9

GLOBE NEWSPAPER COMPANY,
APPELLANT

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE

Notice of Appeal to The Supreme Court of the United States

Notice is hereby given that Globe Newspaper Company, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts of June 30, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

JAMES F. MCHUGH
MARC A. REARDON
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300
Counsel for Appellant

Date: September 22, 1981

[Certificate of Service Omitted]

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
OCT 26 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-611

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

GLOBE NEWSPAPER COMPANY,

Appellant,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

MOTION TO DISMISS OR AFFIRM

FRANCIS X. BELLOTTI
Attorney General
MITCHELL J. SIKORA, JR.
GERALD J. CARUSO
Assistant Attorneys General
2019 McCormack Building
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1032

Attorneys for Appellee

No. 81-611

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

GLOBE NEWSPAPER COMPANY,

Appellant,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

MOTION TO DISMISS OR AFFIRM

FRANCIS X. BELLOTTI
Attorney General
MITCHELL J. SIKORA, JR.
GERALD J. CARUSO
Assistant Attorneys General
2019 McCormack Building
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1032

Attorneys for Appellee

Table of Contents.

Motion to dismiss or affirm 1

Statute involved 2

Issue presented 3

Statement of the case 3

Argument 4

I. The Globe's Sixth Amendment Claim Was Absent From The Opinion And Judgment Below; The Newspaper Lacks Standing To Raise It; And In The Present Circumstances The Contention Is Moot. 4

II. The Supreme Judicial Court Of Massachusetts Has Interpreted The Challenged Statute So As To Accommodate The Globe's First Amendment Concerns; Consequently Its Contention Has Become Insub-. stantial. 11

A. The Challenged Statute Is Free Of The Constitutional Defects Identified By The Richmond Newspapers Opinions. 12

B. The Massachusetts Closure Provision Does Not Violate The First Amendment By Reason of Overbreadth. 21

1. The Overbreadth Doctrine Is Inapplicable. 22

2. If The Overbreadth Doctrine Were Controlling, The Statute Would Satisfy Its Standards Because It Implements Overriding State Concerns In The Manner Least Burdensome To The Interests of the Press. 39

Conclusion 39

TABLE OF AUTHORITIES

CASES

Bates v. Little Rock, 361 U.S. 516 (1960)	23n
Cox v. New Hampshire, 312 U.S. 569 (1941)	25
Elrod v. Burns, 427 U.S. 347 (1976)	23n
Erzonik v. City of Jacksonville, 422 U.S. 205 (1975)	23n
Estes v. Texas, 381 U.S. (1965)	8
First National Bank v. Bellotti, 435 U.S. 765 (1978)	22n
Gannett Co. v. DePasquale, 443 u.S. 368 (1979)	6,7,14, 16n,18, 24

Globe Newspaper Company v. Superior Court for the County of Norfolk (Globe I) Mass. Adv. Sh. (1980) 485	4,5,15, 16n,19, 20,27, 34,35, 35n,
Globe Newspaper Company v. Superior Court for the County of Norfolk (Globe II)Mass. Adv. Sh. (1980) 485	4n,5, 16n,19, 27,29, 30n,35
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)	22n
Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977)	23n
NAACP v. Button, 371 U.S. 415 (1978)	23n
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)	6,8,11, 12,13, 14,16n, 17,18, 19,20 25,36
Sheppard v. Maxwell, 384 U.S. 377 (1966))	8

Village of Schaumburg v.
Citizens for a Better
Environment, 444 U.S.
620 (1980) 22n

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution
First Amendment passim
Fourth Amendment 14
Fifth Amendment 14
Sixth Amendment 5,6,7,
10

M.G.L. c. 278, §16A 11,13,
15,19,
20,21,
23,25,
26,31n
32,33

MISCELLANEOUS

United States Supreme Court
Rule 16 1

J. Wigmore, Evidence §1834 (J. Chadbourne rev. 1976) 16n

Note, Trial Secrecy And The First Amendment Right Of Public Access To Judicial Proceedings, 91 HARV. L. REV. 1899 (1978) 16n, 36n

Note, The Right To Attend Criminal Hearings, 78 COLUM L.Rev. 1308 (1978) 16n

No. 81-611

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

GLOBE NEWSPAPER COMPANY,

Appellant,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

MOTION TO DISMISS OR AFFIRM

In accordance with the provisions of Rule 16 of the Supreme Court of the United States, the Superior Court for the

County of Norfolk, Massachusetts (the Superior Court or the Appellee) moves the Court to dismiss the present appeal from a judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts or to affirm the judgment of that court.

STATUTE INVOLVED.

The Jurisdictional Statement accurately reproduces the statute involved at page 3.

ISSUE PRESENTED.

Whether a state statute commanding trial judges to exclude the press and public from the criminal trial of a sexual offense during the testimony of a minor victim violates the First Amendment right of the press to attend criminal trials.

STATEMENT OF THE CASE.

An accurate statement of the case appears at pages 3-7 [statement of the

Appellant Globe Newspaper Company (the Globe)][1] and 58a-59a (second opinion of the Massachusetts Supreme Judicial Court) of the Jurisdictional Statement.

ARGUMENT

I. The Globe's Sixth Amedment Claim Was Absent From The Opinion And Judgment Below; The Newspaper Lacks Standing To Raise It; And In The Present Circumstances The Contention Is Moot.

1/ At pages 7-8 of the Jurisdictional Statement the Globe goes on to characterize the opinion and judgment of the Supreme Judicial Court.

The first decision of that court, or Globe I, appears at Mass. Adv. Sh. (1980) 485; the second decision, or Globe II, at Mass. Adv. Sh. (1981) 1493. They appear in the Jurisdictional Statement, respectively, at pp. 25a and 57a.

The Globe argues that the Massachusetts statute violates the Sixth Amendment right of the press to attend criminal trials; that the issue is a live one in the present case; and that it maintains standing to press it on appeal. (Jurisdictional Statement at 27-31). For a variety of reasons the newspaper's Sixth Amendment claim does not warrant consideration.

First, the Supreme Judicial Court expressly declined to entertian the question as part of its decisions of both Globe I and Globe II (Jurisdictional Statement 60a-61a & n.5). In both instances it attributed the Sixth Amendment right to the criminal defendant alone and found the newspaper without standing to advance it. Consequent-

ly the present appeal would carry to this Court no prior analysis of the merits of such a claim, and no lower court application of doctrine to facts. It would present merely an abstract occasion for reconsideration of Gannett Co. v. DePasquale, 443 U.S. 368 (1979), in which a majority of the Court rejected the Sixth Amendment contention now revived by the Globe.

Further, when in October, 1980, the Court remanded ths case to the Supreme Judicial Court, it called for further consideration in light of Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Jurisdictional Statement 54a. That decision, of course, rested exclusively and emphatically upon First Amendment grounds. Certainly the lower court accurately interpreted "the mandate in the remand to require us to

consider First Amendment issues only." (Jurisdictional Statement 61a n.5, second paragraph).

Moreover, as the court below twice concluded (Jurisdictional Statement, 60a-61a), the Globe still lacks standing to assert a Sixth Amendment right belonging to a criminal defendant. Gannett Co. v. DePasquale, 443 U.S. 368, 379-381 (1979). The newspaper seeks to amalgamate its interest with that of a criminal defendant denied a completely open trial by operation of M.G.L. c. 278, §16A. It argues that the rights of the criminal defendant and of the press are "inextricably bound up" by a common interest in the tendency of publicity to curb trial abuses and to draw forth unknown witnesses; and that the acquittal unfairly moots out the criminal defendant's public trial interest if the press

cannot carry it forward (Jurisdictional Statement at 29-30).

However these purportedly common interests in publicity are neither congruent nor realistic. The interest of a criminal defendant may conflict, as often as converge, with that of the press. The defendant seeks a fair trial and acquittal; the newspaper seeks publicity. Simultaneous publicity may very well interfere with a fair trial for the defendant. See Sheppard v. Maxwell, 384 U.S. 337, 349-352 (1966); Estes v. Texas, 381 U.S. 532, 538-544 (1965). Indeed, the defendant himself may seek a private trial in whole or part. See Richmond Newspapers, 448 U.S. at 559-561. On the other hand, when a defendant in a case covered by the Massachusetts provision seeks an open trial despite the statute, his understandable objective is more likely to be tactical

than socially beneficial; his purpose is more likely to be the inhibition of the child victim's effective testimony against him than the promotion of the values of openness served by the press. In short, the concerns of a criminal defendant and the press are not inherently identical. They will often differ. The Globe cannot borrow such a foreign interest in order to acquire standing.

Finally, the Globe confronts the mootness of the criminal defendant's interest. An acquitted defendant has no continuing stake in the question of trial publicity. He is not a person experiencing an ongoing injury, yet unable to present it to a court and therefore in need of third-party representation. When he does suffer the injury of conviction and wishes to attack closure, he is capable of doing so directly by appeal in his own behalf. When he

achieves acquittal and desires further vindication, he is free to seek further publicity through the various organs of the press. The lack of a progressive injury to an absent or disabled individual or group distinguishes the present category of case from all those cited by the Globe in support of its third-party standing (see Jurisdictional Statement at 29; to the same effect see the Supreme Judicial Court's disposition of the newspaper's argument in Globe II, id. at 61a n.5).

The newspaper, then, is attempting to borrow an interest both alien and extinct. It is twice removed from a Sixth Amendment claim of its own by hurdles of standing and mootness. It does not seem able to overcome either, let alone both. The present consideration should not extend to the Sixth Amendment contention.

II. The Supreme Judicial Court Of Massachusetts Has Interpreted The Challenged Statute So As To Accommodate The Globe's First Amendment Concerns; Consequently Its Contention Has Become Insubstantial.

The Globe attacks the operation of M.G.L. c. 278, §16A, as a violation of the First Amendment right of press access declared in the Richmond Newspapers decision and as a violation of the more traditional doctrine of unconstitutional overbreadth (Jurisdicitional Statement 12-26).[2/] For the following reasons

---

2/ In its formulation of the questions presented and consequent argument, the Globe no longer attacks the trial judge's discretionary authority to close portions of the trial other than the child victim's testimony upon a hearing and appropriate findings and rulings. See Jurisdictional Statement's "Question Presented" at introductory page.

neither rationale conveys a substantial constitutional question to the Court.

A. The Challenged Statute Is Free Of The Constitutional Defects Identified By The Richmond Newspapers Opinions.

In Richmond Newspapers the Court dealt with a trial judge's exercise of discretion under a statute conferring unfettered authority to close a criminal trial.[3/] The murder trial at issue did not involve a sexual offense or the

---

3/ 448 U.S. at 562, n.4. The Virginia law provided in pertinent part:

> In the trial of all criminal cases, whether the same be felony or misdemeaner cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

testimony of minors.[4/] As reason for closure defense counsel cited the risk of publication of extrinsic material in the press and the resulting danger of jury prejudice.[5/] Moreover the request came after empanelment of the jury.[6/] In complete secrecy the trial went forward to a judge's finding of not guilty at the conclusion of the prosecution's evidence.[7/] In sharp contrast to the present operation of M.G.L. c. 278, §16A, Richmond Newspapers presented the unexplained application of a broadly couched statute whose only conceivable purpose in the circumstances the

---

4/ Id. at 559-562.

5/ Id. at 559-560.

6/ Id. at 559-562; 580-581.

7/ Id. at 561-562.

ordinary remedy of jury sequestration would have served equally well.

Further, the trial judge in Richmond Newspapers ordered, and this Court condemned, the closure of the trial in toto. The plurality opinion was at pains to distinguish access to the entire trial from access to even so important an adjunct as a pretrial hearing upon Fourth and Fifth Amendment questions, as considered in Gannett Co., Inc. v. DePaaquale, 443 U.S. 368 (1979). It framed the question carefully, 448 U.S. at 564:

> But here for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure [emphasis supplied].

As spelled out in Globe I, §16A confines closure to the testimony of the juvenile victim only. Mass. Adv. Sh. (1980) 485, 500; Jurisdictional Statement 40a. The distinction is important to the quantity and quality of press and public access when one remembers the social utility of openness: public supervision of the performance of the participants in the system of justice, including judges, jurors, all counsel, and the police; the deterrence of perjury and the possible attraction of unknown witnesses or other evidence; public education and confidence in, and improvement of, the judicial process; the promotion of the deterrent and retributive purposes of criminal law; and the public's cathartic observation of, or participation in, the criminal justice

process.[8] When a court draws a canopy of secrecy over the entire trial, it forecloses all these social benefits. When it gives momentary[9] privacy to specific testimony only (and for important countervailing policies), it does commensurately less harm, if any, to the values of openness.

Furthermore, all Justices supporting

8/ See Globe I, Mass. Adv. Sh. (1980) at 494-495; Richmond Newspapers, 449 U.S. at 569-573; (concurring opinion of Brennan, J.); Gannett v. DePasquale, 443 U.S. 427-432 (1979) (opinion of Blackmun, J., concurring in part and dissenting in part); J. Wigmore, Evidence §1834 (J. Chadbourne rev. 1976); Note, Trial Secrecy And The First Amendment Right Of Public Access To Judicial Proceedings, 91 HARV. L. REV. 1899, 1905, 1908 (1978); Note, The Right To Attend Criminal Hearings, 78 COLUM L. REV. 1308, 1322-1324 (1978).

9/ Nothing in §16A prevents the subsequent release of transcripts of the private testimony. See Globe II, Mass. Adv. Sh. (1981) 1493, 1503 n.14; Jurisdictional Statement 68a n.14.

the judgment of Richmond Newspapers agreed that the First Amendment right of access to criminal trials was a qualified entitlement subject to overriding exceptions. See the plurality opinions of the Chief Justice joined by Justices White and Stevens, 448 U.S. at 581 n. 18;[10/] the concurring opinion of Justice Brennan joined by Justice Marshall, id. at 598 nn. 23-24; the concurring opinion of Justice Stewart, id. at 600 n. 5; and the concurring opinion of Justice Blackmun, id. at 603-604. Mr. Justice Powell, who did not participate in the Richmond Newspapers case, earlier espoused a First Amendment right of press

---

10/ The plurality wrote, "We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute."

access and noted its qualified character in Gannett v. DePasquale,, 443 U.S. 368 398 (1979).[11] Mr. Justice Rehnquist, dissenting in Richmond Newspapers, would not acknowledge a First Amendment interest, 448 U.S. at 605. Thus all nine Justices envisioned overriding reasons for full or partial closure. They cited such considerations as orderly proceedings, state secrets, the preservaton of trade secrets, the confidential identity

---

11/ [R]ight of access to courtroom proceedings, of course, is not absolute. It is limited both by the constitutional right of defendants to a fair trial . . . and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information and the identity of informats. . . . The task of determining the application of these limitations in each individual trial necessarily falls almost exclusively upon the trial court asked to exclude members of the press and public from the courtroom [citations omitted; emphasis added].

of informants, the government's need for just convictions, and the sensibilities of youthful prosecution witnesses as possible justifications for closure. In that array of legitimate concerns, the protection of minor victims and the pursuit of just convictions served by limited closure under §16A and described by the court in Globe I and Globe II, Jurisdictional Statement at 36a-40a and 67a-72a, rank high and warrant a reasonable exemption from the rule of trial access.

Finally, the summary, and therefore judicially unreviewable character, of the Richmond Newspapers closure gave special offense to the right of access. The justices were repeatedly critical of the unreasoned clearance of the courtroom. See the plurality opinion, 448 U.S. at 580-481; the concurring opinion

of Justice Stevens, id. at 584; and the concurring opinion of Justice Stewart, id at 600-601. The absence of findings, rulings, and reasoning and the summary mode of review exercised by the Virginia Supreme Court, id. at 562, prevented an assessment of even an arguable justification for a private trial. The construction of §16A in Globe I precludes such arbitrary secrecy by its defintion of the scope and reasons for mandatory closure of the minor victim's testimony and by its procedural requirement of a hearing opportunity and fully reasoned determination as part of the discretionary closure of any additional portion of the trial by the presiding judge. Mass. Adv. Sh. (1980) 485, 503-505; Jurisdictional Statement 44a-45a. Those operating features of §16A assure a re-

viewable presentation of any exception to the principle of openness.

B. The Massachusetts Closure Provision Does Not Violate The First Amendment By Reason Of Overbreadth.

The Globe insists that §16A violates the First Amendment by reason of overbreadth. The rationale for this argument is that the statute interdicts free speech; that it is therefore subject to strict scrutiny; and that, under such review it must directly serve a compelling or overriding governmental purpose by the means least drastically curtailing freedom of expression (Jurisdictional Statement, 12-14).

1. The Overbreadth Doctrine Is Inapplicable.

To be sure, a line of decisions illustrates the application of that doctrine to infringement upon First Amendment freedoms of speech and association.[12/] However, for several reasons

---

12/ See especially First National Bank v. Bellotti, 435 U.S. 765, 786, 787-788, 789-790 (1978) (state may not forbid and criminalize specific business corporations' expenditures to advertise views concerning public referenda questions); Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (municipality may not prohibit solicitation of contributions by charitable organizations not using a specified percentage of receipts for charitable purpose); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838-842 (1978) (state may not proscribe media disclosure of information concerning confidential proceedings before a state

(footnote continued)

§16A does not fall within the operation of the overbreadth doctrine. Most fundamentally, it does not enjoin the expression of information; it does not gag the communication of data already in

---

(footnote continued)

judicial conduct commission); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 96-97 (1977) (municipality may not ban "For Sale" signs in an effort to prevent "white flight"); Elrod v. Burns, 427 U.S. 347, 362-363 (1976) (state may not dismiss non-civil service employees solely by reason of political party affiliation); Erzoznik v. City of Jacksonville, 422 U.S. 205, 214-215 (1975) (city may not ban films containing nudity from drive-in screens upon public nuisance grounds); NAACP v. Button, 371 U.S. 415, 438 (1978) (state may not forbid and punish attorney's acceptace of remuneration for litigation services from political organization not formally represented in underlying actions); and Bates v. Little Rock, 361 U.S. 516, 524 (1960) (city may not compel political or civil rights organizations to disclose membership lists for enforcement of occupation license taxes).

possession of the press. Rather it blocks temporarily one avenue of access to information sought for publication. It does not prohibit or punish alternate access to the desired information, such as investigative journalism, interviews outside the courtroom, and the use of subsequent transcripts of the closed testimony. The law requires the press to work without one usual means of preparation for publication. Several Justices have alluded to the critical difference. In Gannett v. DePasquale, 443 U.S. 368, 399 (concurring opinion) (1979), Justice Powell in his proposal of a qualified First Amendment right of attendance, observed, "In the present case, on the other hand [from instances of prior restraint], we are confronted with a trial court's order that in effect denies access to one, albeit im-

portant, source. It does not in any way tell the press what it may and may not publish." In a similar vein in Richmond Newspapers, the plurality remarked that "[j]ust as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, e.g., Cox v. New Hampshire, 312 U.S. 569 (1941), so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." 448 U.S. at 581 n.18. Section 16A, very simply, does not forbid, punish, or chill freedom of speech or association as contemplated in the "strict scruting" procedents.

2. If The Overbreadth Doctrine Were Controlling, The Statute Would Satisfy Its Standards Because It Implements Overriding State Concerns In The Manner Least Burdensome To The Interests Of The Press.

Moreover, if one subjected §16A to overbreadth scrutiny, it would satisfy the elements of the test. It does implement an overriding governmental interest through means least detrimental to the press' right of trial coverage. As the court below twice elaborated, the statute encourages the reporting and prosecution of a genus of painful and often undetectable crime; safeguards the child victim from the momentary trauma and more permanent psychological dangers

of her courtroom appearance; and promotes accurate testimony and just convictions. See Globe I, Mass. Adv. Sh. (1980) 485, 496-500; Jurisdictional Statement 36a-40a; and Globe II, Mass. Adv. Sh. (1981) 1493, 1503-1507, Jurisdictional Statement 68a-72a.

The newspaper asserts that the statute works overinclusively because it does not turn the closure of victims' testimony upon trial judges' case-by-case analyses of its necessity but rather upon a categorical legislative judgment (Jurisdictional Statement 24-26). It insists that case-by-case closure should depend upon particular findings and upon inquiries into less drastic measures for victim protection (id. at 12-14, 24-26).

The contention misses a prime statutory purpose: the certainty of protec-

tion for the child from the beginning of the prosecutorial process. That purpose requires a focus upon two critical moments in the course of the criminal process. The first is the initial contact between the victim and her family, on the one hand, and the police and prosecutor, on the other. In order to bring the victim forward and to keep her forward, the prosecutor must be able to assure her of privacy for her testimony at trial. The certainty of such privacy is crucial to the victim's endurance to trial. The second critical moment, of course, is the fulfillment of that promise at trial so that the child is shielded from the trauma of a public performance and so that she can give full and accurate evidence. Under the Globe's case-by-case proposal, a prosecutor can give a victim no assurance of

private testimony. Such an application of the statute would defeat its major practical feature.[13]/

Further, the case-by-case approach would impose another layer of hearing procedure upon the court and the victim. The trial judge would have to receive some evidence and to undertake fact finding and ruling. The juvenile victim would necessarily participate, and would require some representation by counsel, guardian ad litem, or both.

13/ As the Supreme Judicial Court observed in its rejection of the case-by-case approach, Mass. Adv. Sh. (1981) 1493, 1504-1505, Jurisdictional Statement, 69a:

> Only the most exceptional minor would be sanguine about the possibility that the details of an attack may become public . . . . So, too, the families of youthful victims will be uncertain whether the reporting of a sexual assault will expose a child to additonal trauma caused by the preliminary hearing as well as to public testimony at trial.

The press would want to be heard also at that stage, though they are certainly not entitled to confront the child. The details and implementation of the case-by-case hearing remain to be ironed out. Some risks seem likely. The hearing in particular cases could be substantial; it could be stressful to the victim; and the denial of closure to a victim anxiously seeking it could eliminate her as an effective or willing witness.[14/]

14/ The Supreme Judicial Court described the likely consequences of case-by-case preliminary hearings into the susceptibility of the minor victim, Globe II, Mass. Adv. Sh. (1981) 1493, 1505 n.15; Jurisdictional Statement, 69a n.15.

> As envisioned by the [Globe], the press should be allowed to participate and to present evidence. To adopt such a view would lead not only to a side trial in addition to the criminal trial, but a trial in which the victim would be the focus of conflicting

(footnote continued)

Nor has the Globe identified a realistic variety of less drastic alternatives for use by trial judges upon a case-by-case basis. Below it has referred generally to the availability of

---

(footnote continued)

> psychiatric testimony and perhaps examination and cross-examintion. We can perceive no procedure more damaging to the well-being of the child; nor one better designed to inhibit criminal complaints and convictions in such cases.

In its Jurisdictional Statement, the Globe nonetheless proposes just such a cumbersome and deleterious procedure, id. at 26:

> More concretely, in a case arising under §16A, the object of the hearing should be to determine whether closure is necessary to prevent a high degree of likelihood of serious psychological harm to the victim if testimony is taken in public, whether alternatives to closure will adequately protect against such harm, and whether closure will be effective in protecting against the perceived psychological harm to the young victim.

rape counseling services. One must remember that less drastic alternatives mean devices less drastic but nonetheless effective of a statutory end. It is conjectural that rape counseling services could adequately substitute for the operation of §16A, or that they pose a practical alternative to the statute.

The Court below shaped the statute to its least drastic dimensions. The law categorically closes the testimony of the victim only; it leaves open the remainder of the trial; it maintains the possibility of transcripts of the closed testimony in accordance with the trial judge's sound discretion; and it leaves the press and the victim free to communicate outside the courtroom as they may wish.

Nor is the statute underinclusive for failure to achieve a putative purpose of complete secrecy or anonymity for a minor victim. The Globe hypothesizes such an objective for the provision as it oberves that a certain quantum of embarrassment and even stigmatization are inevitable for the victim despite the operation of the law. It would conclude, therefore, that §16A cannot accomplish its ends and thereby cannot justify the regulation of the press' First Amendment interest, Jurisdictional Statement 19-23. The analysis foists an artificial purpose upon the statute. The provision does not purport to furnish an hermetic insulation for the child against all public knowledge of her victimization. That promise would hardly be realistic. Rather the law offers the minor and her family the

assurance of a reasonable enclave during the traumatic moment of trial testimony. If that limited guarantee furnishes the victim sufficient comfort to assist in the prosecution, it has served an overriding public interest.

To strengthen the theme of possible overbreadth, the Globe posits the anomalous case in which a child affirmatively waives the statutory right of closure. It reasons that in such a circumstance the law would be serving no compelling state interest, Jurisdictional Statement 20. The Supreme Judicial Court rejected the implied waivability of the statutory right upon the ground that a determination of the waiver's validity, of its knowing and voluntary character on the part of the child, would require another form of unwieldy and damaging side hearings. Globe I, Mass. Adv. Sh. (1980) 485, 500

n.21 and Jurisdictional Statement 40a-41a n.21; Globe II, Mass. Adv. Sh. (1981) 1493, 1505 n.15 and Jurisdictional Statement at 69a n.15.

As a matter of equal importance, the state shares an ultimate public interest in the closure of the minor's testimony: the procurement of accurate testimony and the achievement of just convictions.[15/] The statutory right does

---

15/ See Globe I, Mass. Adv. Sh. (1980) 485, 400-500, Jurisdictional Statement 39a-40a:

> Thus the purpose of [the statute] is to encourage young victims of sexual offenses to come forward; once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial . . . . In broader terms, the statute's purposes go beyond protection of juvenile privacy to encompass the State's interest in sound and orderly administration of justice; most important, the statute helps obtain just convic-

(footnote continued)

not belong exclusively to the minor victim. Consequently the desire of a minor victim and her family to publicize her ordeal from the witness stand should not exclusively determine closure. The state may be wary of the credibility or perceived credibility of the testimony of a victim eager for a large audience. It may question

---

(footnote continued)

> the types of crimes from which the victims had often suffered at the hands of the criminal justice system, while their assailants had often gone free.

Even prior to the Richmond Newspapers decision, commentators urging a First Amendment doctrine of press access had acknowledged the potentially overriding importance of accurate results in criminal trials. See especially Note, Trial Secrecy And The First Amendment Right Of Public Access To Judicial Proceedings, 91 HARV. L. REV. 1899, 1914-1916, 1918-1919 (1978).

her poise to testify accurately and effectively amid a large surrounding and through closure protect her against herself. The objective of accurate testimony, inculpatory or exculpatory, and of a just conviction or acquittal, are overriding. The statute compels their pursuit. The primary object of the trial is their attainment, and not the attraction of publicity for the victim.

Finally, as to the issue of waiver, the statute in no respect forbids the determined victim and family to publicize her experience outside the trial. Victims wanting to explain the heinousness of sexual crimes and to disseminate some resulting useful information remain utterly free to do so with or without the assistance of the media outside the courtroom. The policy of the

statute, however, is within the trial to subordinate that publicity value to the fundamental truth-seeking purpose of a criminal proceeding. For these reasons the statute justifiably overrides the unusual claim of waiver.

CONCLUSION

Therefore the appellee Superior Court submits that the question proposed does not warrant plenary review of the decisions below; and it moves the Court to dismiss this appeal from, or to affirm, the judgment of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

FRANCIS X. BELLOTTI
Attorney General

MITCHELL J. SIKORA, JR.
GERALD J. CARUSO
Assistant Attorneys General
2019 McCormack Building
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1032

Attorneys for Appellee

Dated: October 21, 1981.

Appellant's Reply Brief

1

Office - Supreme Court, U.S.
FILED
NOV 4 1981
ALEXANDER L. STEVAS
CLERK

No. 81-611

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

GLOBE NEWSPAPER COMPANY,
Appellant,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

James F. McHugh
Robert Haydock, Jr.
Marc A. Reardon
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300

Attorneys for Appellant

TABLE OF AUTHORITIES CITED.

CASES.

PAGE

Carey v. Population Services International, 431 U.S. 678 (1977)...19

Chicago, Burlington and Quincy Railway Co. v. Drainage Comm'rs, 200 U.S. 561 (1906).....17

Craig v. Boren, 429 U.S. 190 (1976)....19

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).....17

Eisenstadt v. Baird, 405 U.S. 438 (1972).....19

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).....10

Lawrence v. State Tax Comm'n 286 U.S. 276 (1932).....17

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).....14

Schneider v. State, 308 U.S. 147 (1939).....13

Singleton v. Wulff, 428 U.S. 106 (1976).....18

Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979).....9,10

Southeastern Promotions, Ltd. v.
Conrad, 420 U.S. 546.....13

Commonwealth v. Marshall, 356
Mass. 432 (1969).....6

In the
Supreme Court of the United States.
October Term, 1981.

No. 81-611.

GLOBE NEWSPAPER COMPANY,

Appellant,

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.5 of the rules of this Court, appellant, Globe Newspaper Company (the "Globe"), submits this brief in opposition to the Motion to Dismiss or Affirm filed by appellee, the Superior Court for the County of Norfolk (the

"Commonwealth"). The Globe does so for the purpose of addressing the Commonwealth's assertions (1) that the federal question presented in this case is insubstantial, and (2) that the Globe has no standing to raise in this Court the Sixth-Amendment claim it has asserted.

The Commonwealth argues that the federal question presented in this case is insubstantial for two reasons. First, the Commonwealth asserts that the statute serves an "overriding state interest" (Motion to Dismiss at 26) because it enables a prosecutor to offer the victim the "certainty" of "privacy for her testimony at trial". Id. at 28. Second, and somewhat paradoxically, the Commonwealth contends that the incursion upon the First-Amendment rights of the press and public occasioned by the closure

statute is at most a "momentary" (id. at 16) closing of only "one avenue of access to information". Id. at 24. Neither of these arguments warrants dismissal of the present appeal for both wholly miss the mark.

The Commonwealth's first argument is that, in order to assure the cooperation of the victim of a crime encompassed by section 16A, the prosecutor must be able to offer in all cases "the certainty of protection for the child from the beginning of the prosecutional process." Id. at 27-28. That protection, says the Commonwealth, takes the form of an assurance "of privacy for [the victim's] testimony at trial" (id. at 28), an assurance necessary both "to bring the victim forward" initially and to ensure the victim's perserverance through the

trial. Id. The Commonwealth contends that the ability of the prosecutor to offer that assurance is the "prime statutory purpose" (id. at 27) and the "major practical feature" (id. at 29) of section 16A.

Not only is the Commonwealth's assertion concerning the necessity of a statute like section 16A offered without proof but, in addition, it is contradicted by the very facts of this case. By the Commonwealth's own admission, neither the certainty of privacy nor privacy itself was necessary here either to bring the victims forward or to have them persevere through trial. Indeed, the district attorney responsible for prosecuting the criminal case, after discussing the closure order with the victims, specifically waived whatever rights the

Commonwealth might have had under section 16A to seek to exclude the press from the trial. Jurisdictional Statement at 5. In addition, the victims themselves stated that they had no objections to the presence, per se, of the press at trial (Jurisdictional Statement at 5 n. 3), and the record is devoid of any evidence showing that they would not have testified had the trial been open to all. Thus, the ability of the prosecution to offer the certainty of privacy, which is now characterized as the prime statutory purpose of section 16A, was of little concern to either the prosecutor or victims at earlier stages of this very case.

Moreover, if the certainty of privacy for the victim's testimony at trial is the goal which section 16A seeks, the statute

must inevitably fail to achieve its objective in any meaningful sense. In the first place, exclusion of the press and public from a trial during the victim's testimony can hardly be said to make that testimony "private". The requirements of the Sixth Amendment and the Supreme Judicial Court's prior interpretations of section 16A, e.g., Commonwealth v. Marshall, 356 Mass. 432 (1969), ensure that the victim's testimony will take place before a host of people previously unknown to the victim even if press and public are excluded from the courtroom. Jurisdictional Statement at 19.

Second, as the Commonwealth correctly states, section 16A does not assure that the victim's testimony will be private in the sense that no accounts of it will be available to the public. The statute does

not and could not bar access to the victim's testimony from second-hand sources "such as investigative journalism, interviews outside the courtroom, and the use of subsequent transcripts of the closed testimony." Motion to Dismiss at 24. Indeed, transcripts of the victim's testimony are not even covered by the statute and, as a result, may be released to the press and public in the exercise of the trial court's discretion. Jurisdictional Statement at App. 68a n.14.

Finally, and perhaps most importantly, the mandatory aspects of section 16A apply even if the victim desires to testify in public. The victim can hold a press conference outside the courtroom to recreate by approximation the testimony given inside. Motion to Dismiss at 37. The victim can call up members of

the press to tell them what was said while on the witness stand. Id. Indeed, the victim can personally hand-deliver to the press transcripts of the closed testimony when those transcripts are prepared. Id. at 24, 37. Although all victims are able to do all of those things, all are absolutely prohibited from testifying in public. At least with respect to victims who desire public testimony, the statutory prohibition serves an interest which is wholly irrelevant and thus cannot possibly be viewed as the linchpin for their cooperation. Surely, even the possibility of such a result casts serious doubt on the Commonwealth's assertion that the statute is an indispensible tool of the prosecution in all cases involving all minor victims of all "crimes involving sex."

In the last analysis, the goal of certain privacy for the victim's testimony is a goal which section 16A cannot possibly accomplish. Its inability to do so, even if it served a state interest of the highest order, would render impermissible its incursion on First-Amendment freedoms. See Smith v. Daily Mail Publishing Co., 443 U.S. 97, 105 (1979). But the statute serves no such interest. It was not necessary in this case. Its "protections" apply with unyielding force even to those who do not need or want those protections. Finally, the statute, in its mandatory aspect, stands alone amidst a plethora of statutes in other states which permit, indeed require, careful case-by-case consideration of the question whether any part of a trial of a sexual assault on a minor

victim should be closed to press and public. See Jurisdictional Statement at 16. At the least, the experience in those other states strongly suggests that the cooperation of victims can be secured by means far less drastic than those embodied in section 16A. See generally Smith v. Daily Mail Publishing Co., 443 U.S. 97, 105 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 834-35 (1978).

The second rationale advanced by the Commonwealth to support its argument that the federal question presented in this case is insubstantial is that section 16A only "blocks temporarily one avenue of access to information sought for publication". Motion to Dismiss at 24. The Commonwealth reasons that because the substance of the closed testimony will be available to the public through other,

albeit second-hand, reports the deprivation of First-Amendment rights entailed in closure somehow becomes insignificant. The Commonwealth's argument both underestimates the importance of first-hand observation of a criminal trial and misconstrues an important segment of First-Amendment jurisprudence.

First of all, the deprivation of First-Amendment rights embodied in closure is not "temporary" or "momentary" (Motion To Dismiss at 16, 24), but instead is permanent. The fact that members of the press may, subsequent to the testimony of the victim, learn the substance of that testimony by interviewing those who were present or by reading a transcript does not undo the damage. It cannot be doubted that the testimony of the victim is among

the most important items of evidence presented in the trial of a sexual assault. But the evidence presented through the victim does not consist simply of the words he or she utters while on the witness stand. A transcript thus captures that evidence imperfectly even if it records every utterance with perfect fidelity. Indeed, the inability of a transcript to record all of the evidence presented through the testimony of a witness is the primary reason for an appellate court's reluctance to substitute its judgment for that of the trial court where issues of credibility are concerned. E.g., United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949). Accounts of the testimony given by those who observed it are even less likely to capture accurately the evidence presented at trial. Given

the identity of those who are likely to hear that testimony and then to describe it publicly, those accounts are quite likely to be refracted through the prism of self-interest. There is, in sum, no adequate substitute for first-hand observation and the closure wrought by section 16A makes such observation impossible forever.

Secondly, it is axiomatic that exercise in one manner of rights guaranteed by the First Amendment may not be abridged on the ground that those rights may be exercised in some other place or manner. Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975); Schneider v. State, 308 U.S. 147, 163 (1939). The Commonwealth thus may not exclude the press or public from portions

of criminal trials on the ground that the information which may be gathered at that trial is available elsewhere. Indeed, the right to attend criminal trials, and not simply the right to hear someone's version of what happened at a trial, was the right on which this Court focused when it stated that:

> the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (opinion of Burger, C.J.), quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972). The Commonwealth cannot simply exorcise that right with a

transcript or a bystander's version of what went on.[1]

The Commonwealth's second major argument is that the Globe may not properly raise a Sixth-Amendment claim before this Court. In support of its argument, the Commonwealth presses two

---

[1]The Commonwealth attempts to distinguish Richmond Newspapers from the present case by pointing to the Court's criticism in that case of the trial court's "unreasoned clearance of the courtroom" characterized by the "absence of findings, rulings and reasoning" by the trial judge to support closure. Motion to Dismiss at 19-20. Those facts the Commonwealth contrasts to the "construction of section 16A in Globe I [which] precludes such arbitrary secrecy by its definition of the scope and reasons for mandatory closure of the minor victim's testimony..." Id. at 20. Contrary to the Commonwealth's suggestion, the mandatory aspect of section 16A is a fortiori arbitrary in operation. It requires closure even where the reasons underlying the statute are wholly inapplicable. The case in which the reasons supporting the statute would be inapplicable is not, moreover, the anomalous case the Commonwealth would make it out to be. Indeed, that case is this case.

main points. It first asserts that because "the Supreme Judicial Court declined to entertain the question as part of its decisions of Globe I and Globe II" this Court should similarly decline to consider the question in order to escape "an abstract occasion for reconsideration of Gannett Co. v. DePasquale". Motion to Dismiss at 5-6. The point missed by the Commonwealth's argument is that the failure of the Supreme Judicial Court to entertain in either Globe I or Globe II the Sixth-Amendment claims advanced by the Globe in effect denied those claims. The refusal of the Supreme Judicial Court to pass on the claims certainly has no adverse impact on this Court's jurisdiction, as "the necessary effect of the Supreme Judicial Court's judgment [was] to deny a Federal right or immunity

specially set up or claimed, and which, if recognized and enforced, would [have] require[d] a judgment different from one resting upon some ground of local or general law." Chicago, Burlington and Quincy Railway Co. v. Drainage Comm'rs, 200 U.S. 561, 580 (1906). The failure of the Supreme Judicial Court to recognize the claimed right "necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied." Id. at 581. Accord Lawrence v. State Tax Comm'n, 286 U.S. 276, 282 (1932); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921). Moreover, no abstract reconsideration of Gannett is sought here. The facts of this case are concrete and they are very different from those on which this Court's Gannett decision was based.

The Commonwealth's second point is that the Globe lacks standing to raise a Sixth-Amendment claim because the "interest of a criminal defendant may conflict, as often as converge, with that of the press." Motion to Dismiss at 8. The Globe, however, has not argued that its interests and those of the criminal defendant are identical in every respect, nor do this Court's cases require that perfect identity. Indeed, it is not an identity of interests but an identity of objective, coupled with the practical inability of the third party to pursue its remedies, which has motivated this Court to grant standing to represent the interests of absent third parties. See Singleton v. Wulff, 428 U.S. 106, 114-18 (1976). Thus, for example, this Court has permitted sellers to represent the

interest of buyers or potential buyers of their products, not because the interests of the seller and the buyer were identical, but because buyer and seller shared a common goal, i.e., transfer of the product. See Carey v. Population Services International, 431 U.S. 678 (1977); Craig v. Boren, 429 U.S. 190 (1976). See generally Eisenstadt v. Baird, 405 U.S. 438 (1972).

In the present case, the Globe and the defendant had the common goal of keeping the trial open to the press and public in its entirety. Even assuming that their reasons for doing so differed, their objective was identical. The reportorial activity the Globe wished to pursue was inextricably bound up with the public trial the defendant desired. Denial of the defendant's public-trial

claim directly and adversely affected the Globe's ability to report about that trial. Because of his acquittal, a practical impediment to vindication of the defendant's public-trial claim now exists. Indeed, because acquittal always was a possibility, that practical impediment loomed large from the outset. In sum, the criteria for standing recognized by this Court in earlier cases, see Jurisdictional Statement at 29-30, have been met here. As a result, the Globe should have standing to raise the Sixth-Amendment claims it presses on this Court and previously asserted unsuccessfully in the Supreme Judicial Court.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Jurisdictional Statement, appellant respectfully requests that the Motion to Dismiss be denied and that probable jurisdiction be noted.

Respectfully submitted,

James F. McHugh
Robert Haydock, Jr.
Marc A. Reardon
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300

Appellant's Brief

Office - Supreme Court, U.S.
FILED
JAN 5 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-611

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF APPELLANT

JAMES F. MCHUGH
MARC A. REARDON
JANE E. SERENE
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300
Counsel for Appellant

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED.

Whether the First, Sixth and Fourteenth Amendments to the Constitution of the United States render Massachusetts General Laws, ch. 278, § 16A void as construed by the Supreme Judicial Court for the Commonwealth of Massachusetts to require exclusion of the press and public from portions of all trials of certain crimes even over the opposition of the defendant and even in the absence of a request for exclusion by the prosecution or the victim.

PARTIES BELOW.

Appellant, Globe Newspaper Company, is a corporation organized and existing under the laws of the Commonwealth of Massachusetts. It has four wholly-owned subsidiaries: Community Newsdealers, Inc., a Massachusetts corporation, Suburban News Agency, Inc., a Massachusetts corporation, The Globe Pequot Press, Inc., a Connecticut corporation, and Wilson-Tisdale Company, a Massachusetts corporation.

Globe Newspaper Company itself is a wholly-owned subsidiary of Affiliated Publications, Inc., a Massachusetts corporation. Affiliated Publications, Inc. has two other wholly-owned subsidiaries: Affiliated Broadcasting, Inc., a Massachusetts corporation and Affiliated Cable, Inc., an Oregon corporation. Affiliated Broadcasting, Inc. owns and operates the following radio stations: WSAI-AM and WSAI-FM (Cincinnati, Ohio), KRAK-AM and KEWT-FM (Sacramento, California), KMPS-AM and KMPS-FM (Seattle, Washington), WFAS-AM and WWYD-FM (White Plains, New York), WHYM-AM and WHYM-FM (Springfield, Massachusetts), and WOKV-AM and WAIV-FM (Jacksonville, Florida). Affiliated Publications, Inc. also owns 45% of the issued and outstanding shares of McCaw Communications Companies, Inc., a Washington corporation.

Appellee, the Superior Court for the County of Norfolk, is the trial court of general jurisdiction in Norfolk County, Massachusetts.

Table of Contents.

Opinions below 1

Jurisdiction 2

Statute involved 3

Statement of the case 3

A. Proceedings in the Superior Court for the county of Norfolk 3

B. Proceedings in the Supreme Judicial Court for Suffolk county 5

C. The first appeal: Globe I 9

D. The second appeal: Globe II 10

Summary of argument 12

Argument

I. Massachusetts General Laws, ch. 278, § 16A as construed by the Supreme Judicial Court and as applied in this case violates the First Amendment to the Constitution of the United States as applied to the states through the Fourteenth Amendment 14

A. The First Amendment right to attend criminal trials strongly presumes that such trials must be open in their entirety 14

B. As construed and applied by the Supreme Judicial Court, M.G.L. ch. 278, § 16A violates the First Amendment guarantee that criminal trials will be open to public observation 23

1. There is no exception to the First Amendment which permits routine closure of a criminal trial on the basis of subject-matter alone 24

2. The statute does not have a de minimis impact on rights guaranteed by the First Amendment 27

3. The interests identified by the Supreme Judicial Court are insufficient to require closure of all testimony of all victims at all trials comprehended by M.G.L. ch. 278, § 16A 29

II. Massachusetts General Laws, ch. 278, § 16A as construed by the Supreme Judicial Court and as applied in this case violates the Sixth Amendment to the Constitution of the United States as applied to the states through the Fourteenth Amendment 40

A. Appellant has standing to invoke the public trial guarantee of the Sixth Amendment 40

B. Appellant has standing to invoke the public trial guarantee of the defendant who opposed closure 46

C. As construed by the Supreme Judicial Court to require closure of a criminal trial during the testimony of a minor victim, M.G.L. ch. 278, § 16A violates the Sixth Amendment 49

Conclusion 50

Table of Authorities Cited.

CASES.

Ashland Publishing Co. v. Asbury, 612 S.W.2d 749 (Ky. App. 1980) 22n

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 41

Baker v. Carr, 369 U.S. 186 (1962) 41

Barrows v. Jackson, 346 U.S. 249 (1953) 46, 47

Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944) 25n

Bivins v. State, 313 So.2d 471 (Fla. App. 1975) 25n

Brandenburg v. Ohio, 395 U.S. 444 (1969) 18

Branzburg v. Hayes, 408 U.S. 665 (1972) 15, 49

Bridges v. California, 314 U.S. 252 (1941) 18

Brown v. Board of Education, 347 U.S. 483 (1954) 24

Butler v. Michigan, 352 U.S. 380 (1957) 26n, 37

Carey v. Population Services International, 431 U.S. 678 (1977) 47

Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968) 21, 22

Cohen v. California, 403 U.S. 15 (1971) 28

Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455 (1949), cert. denied, 339 U.S. 984 (1950) 26n, 32, 39

Commonwealth v. Marshall, 356 Mass. 432, 253 N.E.2d 333 (1969) 29, 32

Commonwealth v. Stevens, 237 Pa. Super. 457, 352 A.2d 509 (1975) 25n

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 19, 44

Craig v. Boren, 429 U.S. 190 (1976) 47

Craig v. Harney, 331 U.S. 367 (1947) 20n, 44

Davis v. Alaska, 415 U.S. 308 (1974) 37

Des Moines Register & Tribune Co. v. Hildreth, 181 N.W.2d 216 (Iowa 1970) 25n

Detroit Free Press v. Recorder's Court Judge, 409 Mich. 364, 294 N.W.2d 827 (1980) 22n, 25n

Doe v. Stegall, 653 F.2d 180 (5th Cir. 1981) 37

Douglas v. State, 328 So.2d 18 (Fla.), cert. denied, 429 U.S. 871 (1976) 26n

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 47

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 20

FCC v. Sanders Radio Station, 309 U.S. 470 (1940) 47

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 17, 20, 33

Freedman v. Maryland, 380 U.S. 51 (1965) 22

Gannett Co. v. DePasquale, 443 U.S. 368 (1979) 13, 14, 18, 20n, 21 et seq.

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 27

Gibson v. Florida Legislative Committee, 372 U.S. 539 (1963) 19

Gitlow v. New York, 268 U.S. 652 (1925) 18

Globe Newspaper Co. v. Superior Court, Mass. Adv. Sh. (1980) 485, 401 N.E.2d 360 (Globe I) *passim*

Globe Newspaper Co. v. Superior Court, Mass. Adv. Sh. (1981) 1493, 423 N.E.2d 773 (Globe II) *passim*

Gooding v. Wilson, 405 U.S. 518 (1972) 28

Griswold v. Connecticut, 381 U.S. 479 (1965) 27, 46, 47

Groppi v. Wisconsin, 400 U.S. 505 (1971) 49

Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935) 25n

In re Oliver, 333 U.S. 257 (1948) 39, 44

In re P.R., 7 Med. L. Rep. 2277 (Colo. 1981) 20n, 22n

In re United States ex rel. Pulitzer Pub. Co., 635 F.2d 676 (8th Cir. 1980) 22n
In re Winship, 397 U.S. 358 (1970) 37
Katzenbach v. Morgan, 384 U.S. 641 (1966) 17
Kirstowsky v. Superior Court, 143 Cal. App.2d 745, 300 P.2d 163 (1956) 25n
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 18, 32
Lecates v. Lecates, 38 Del. 190, 190 A. 294 (1937) 25n
Levine v. United States, 362 U.S. 610 (1960) 44
Lexington Herald Leader v. Tackett, 601 S.W.2d 905 (Ky. 1980) 25n, 31
Marshall v. State, 254 Ind. 156, 258 N.E.2d 628 (1970) 25n
McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) 24
Metromedia, Inc. v. City of San Diego, 101 S.Ct. 2882 (1981) 20
Morrissette v. Commonwealth, Mass. Adv. Sh. (1980) 765, 402 N.E.2d 492 48
NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1958) 20
NAACP v. Button, 371 U.S. 415 (1963) 19
Neal v. State, 86 Okla. Crim. 283, 192 P.2d 294 (1948) 25n
Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 21, 44
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 18
New York Times Co. v. United States, 403 U.S. 713 (1971) 21
NLRB v. Dinion Coil Co., 201 F.2d 484 (2d Cir. 1952) 29
Offutt v. United States, 348 U.S. 11 (1954) 44
Oklahoma Publishing Co. v. District Court of Oklahoma County, 430 U.S. 308 (1977) 50

Patuxent Publishing Corp. v. State, 429 A.2d 554 (Md. 1981) 22n

People v. Latimore, 33 Ill. App.3d 812, 342 N.E.2d 209 (1975) 25n

People v. March, 95 Ill. App.3d 46, 419 N.E.2d 1212 (1981) 22n

Pocatello v. United States, 394 F.2d 115 (9th Cir. 1968) 38

Police Department of Chicago v. Moseley, 408 U.S. 92 (1972) 17

Price v. State, 496 S.W.2d 103 (Tex. Crim. App. 1973) 25n, 26n

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 10, 12, 15, 17, 18 et seq.

Riley v. State, 83 Nev. 282, 429 P.2d 59 (1967) 25n

Sacramento Bee v. United States District Court, 656 F.2d 477 (9th Cir. 1981) 22n

Schad v. Borough of Mount Ephraim, 101 S.Ct. 2176 (1981) 20

Schneider v. State, 308 U.S. 147 (1939) 28

Shelton v. Tucker, 364 U.S. 479 (1960) 20

Sheppard v. Maxwell, 384 U.S. 333 (1966) 44, 45

Sherbert v. Verner, 374 U.S. 398 (1963) 18

Singleton v. Wulff, 428 U.S. 106 (1976) 41, 47, 48

Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) 21, 32, 33, 49

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 28

Speiser v. Randall, 357 U.S. 513 (1958) 18, 21

Spence v. Washington, 418 U.S. 405 (1974) 28

Stanley v. Georgia, 394 U.S. 557 (1969) 27

State v. Blake, 113 N.H. 115, 305 A.2d 300 (1973) 25n
State v. Callahan, 100 Minn. 63, 110 N.W. 342 (1907) 25n
State v. Croak, 167 La. 92, 118 So. 703 (1928) 25n
State v. Damm, 62 S.D. 123, 252 N.W. 7 (1933) 25n
State ex rel. Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976) 29
State v. Green, 395 So.2d 532 (Fla. 1981) 22n
State v. Hensley, 75 Ohio St. 255, 79 N.E. 462 (1906) 25n
State v. Holm, 67 Wyo. 360, 224 P.2d 500 (1950) 25n
State v. Nyhus, 19 N.D. 326, 124 N.W. 71 (1909) 25n
State v. Osborne, 54 Or. 289, 103 P. 62 (1909) 25n
State v. Padilla, 91 N.M. 800, 581 P.2d 1295 (1978) 25n
State v. Purvis, 157 Conn. 198, 251 A.2d 178 (1968), cert. denied sub nom. Purvis v. Connecticut, 395 U.S. 928 (1969) 25n
State v. Santos, 413 A.2d 58 (R.I. 1980) 25n
State v. Schmit, 273 Minn. 78, 139 N.W.2d 800 (1966) 31
State v. Sheppard, 7 Med. L. Rep. 1140 (Conn. 1980) 22n, 25n, 31
State v. Sinclair, 274 S.E.2d 411 (S.C. 1981) 22n, 25n
State v. Smith, 90 Utah 482, 62 P.2d 1110 (1936) 25n
State v. Wahle, 298 N.W.2d 795 (S.D. 1980) 22n
Thornhill v. Alabama, 310 U.S. 88 (1940) 17, 19, 20
Time, Inc. v. Hill, 385 U.S. 374 (1967) 18
Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969) 19
United States v. Carolene Products, 304 U.S. 144 (1938) 17
United States v. Cianfrani, 573 F.2d 835 (3rd Cir. 1978) 44, 45

United States v. Edwards, 7 Med. L. Rep. 1324 (D.C. 1981) 22n
United States ex rel. Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), cert. denied, 434 U.S. 1076 (1978) 26n
United States v. O'Brien, 391 U.S. 367 (1968) 20
Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 19
Warth v. Seldin, 422 U.S. 490 (1975) 41
Weinstein v. Bradford, 423 U.S. 147 (1975) 48
Whitney v. California, 274 U.S. 357 (1927) 18, 20n
Wood v. Georgia, 370 U.S. (1962) 17

STATUTORY PROVISIONS.

United States Constitution
First Amendment 2, 10, 11, 12, 14 et seq.
Sixth Amendment 2, 10, 13, 14, 16n et seq.
Ninth Amendment 46
Fourteenth Amendment 2, 12, 15, 42n
Mississippi Constitution § 26 25n
28 U.S.C. § 1257(2) 3
1923 Mass. Acts, ch. 251 15n
1931 Mass. Acts, ch. 205 15n
Massachusetts General Laws
ch. 4, § 7, cl. 48 37
ch. 41, § 97B 30n
ch. 211, § 3 5
ch. 220, § 13A 26n
ch. 233, § 21B 30n
ch. 265, § 22A 37
§ 23 37

Massachusetts General Laws
ch. 272, § 15 33n
§ 16 33n
§ 19-20 33n
§ 28 33n
§ 29 33n
§ 53 33n
ch. 278, § 16A *passim*
Ala. Code § 12-21-202 (1975) 27n
Ariz. R. Crim. P. 9.3(c) 25n
Ga. Code § 81-1006 25n
N.C. Gen. Stat. § 15-166 (1975) 27n
N.Y. Jud. Law § 4 (1975) 27n
Va. Code § 19.2-266 25n
Vt. Stat. Ann. tit. 12, § 1901 25n, 26n

MISCELLANEOUS.

ABA Standards for Criminal Justice, Fair Trial & Free Press, 8-3.2 20n
Annot., 39 A.L.R.3d 852 25n
1 J. Bentham, The Rationale of Judicial Evidence 576 (1827) 45
A. Bickel, The Least Dangerous Branch 108-10 (1962) 24
Bohmer, Judicial Attitudes Toward Rape Victims, in Forcible Rape (D. Chappell, et al., eds. 1977) 34n
Bohmer & Blumberg, Twice Traumatized: The Rape Victim and the Court, 58 Judicature 391 (1975) 36n
Brennan, Address, 32 Rutgers L. Rev. 173 (1979) 49

L. Brodyaga, et al., Rape and Its Victims, A Report for Citizens, Health Facilities, and Criminal Justice Agencies, chs. 8-9 (1975) 34n, 36n

Burgess & Lazlo, When the Prosecutrix is a Child: The Victim Consultant in Cases of Sexual Assault, in Victims and Society (E. Viano, ed. 1976) 34n

B. Cardozo, The Nature of the Judicial Process 76-88 (1921) 24

The Federalist No. 78 (A. Hamilton) at 524-525 (Heritage ed. 1945) 17, 18, 46

The First and Ninth Amendment Theory of a Right of Access to Criminal Trials, 2 W.N. Eng. L. Rev. 723 46

T. Gibbon & J. Prince, Child Victims of Sex Offenses 7 (1963) 35n

W. Leach & P. Liacos, Handbook of Massachusetts Evidence 75 (1967) 5n

Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne St. L. Rev. 977 (1969) 35n

J. McDonald, Rape: Offenders and Their Victims 128-130 (1970) 34n

A. Meiklejohn, Free Speech and Its Relation to Self-Government 26 (1948) 19

Monaghan, First Amendment "Due Process", 83 Harv. L. Rev. 518 (1970) 22

O'Neale, Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Prosecution — Or How Many Times Must a Woman be Raped? 18 Santa Clara L. Rev. 119 (1978) 35n

B. Patterson, the Forgotten Ninth Amendment 13 (1955) 46

Peters, The Philadelphia Rape Victim Project, in Forcible Rape (D. Chappell, et al., eds. 1977) 35n

Radin, The Right to a Public Trial, 6 Temp. L.Q. 381 (1931) 45n

Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 87 F.R.D. 519 (1980) 17, 20n

Strong, Fifty Years "Clear and Present Danger": From Schenck To Brandenburg and Beyond 1969 Sup. Ct. Rev. 41 20n

J. Tanford & J. Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. Pa. L. Rev. 544 (1980) 30n, 36n

Wood, The Victim in a Forcible Rape Case: A Feminist View, in Rape: The First Sourcebook for Women (N. Connell & C. Wilson, eds.) 35n, 36n

9 Writings of James Madison 103 (G. Hunt ed. 1910) 19

No. 81-611.

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

Brief of Appellant

OPINIONS BELOW.

The judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts from which this appeal is taken (J.A. 89a)[1] was accompanied by an opinion (J.A. 90a-107a) reported at Mass. Adv. Sh. (1981) 1493, 423 N.E.2d 773. The

[1] The reference J.A. is a reference to the Joint Appendix which the parties have filed with this Court.

Supreme Judicial Court's first opinion in this case (J.A. 59a-87a) is reported at Mass. Adv. Sh. (1980) 485, 401 N.E.2d 360.

The order of this Court vacating the Supreme Judicial Court's first judgment and remanding the case for further consideration (J.A. 88a) is reported at 449 U.S. 894 (1980).

The judgment of the Single Justice of the Supreme Judicial Court for the County of Suffolk from which the appeal was taken to the Supreme Judicial Court (J.A. 44a) is unreported. The order of the trial judge in the Superior Court for the County of Norfolk excluding appellant from the trial (J.A. 17a-18a) was oral and unreported.

JURISDICTION.

This is an appeal from a final judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts entered June 30, 1981. In the opinion which accompanied that judgment, the Supreme Judicial Court held that M.G.L. ch. 278, § 16A requires a trial judge to exclude the press and public from the trial of certain crimes when the minor victims of these crimes are testifying (J.A. 105a). The court held that the statute applied with unyielding force even in cases like this one where the defendant objected and thereby sought a public trial (J.A. 93a). Moreover, holding that the statute did not permit anyone to waive its mandatory provisions, the court ruled that it applied even where, as here, neither the prosecutor nor the victim requested entry of an exclusionary order (J.A. 102a n.15). The Supreme Judicial Court concluded that, even as thus construed and applied, the statute did not violate the First and Fourteenth Amendments to the Constitution. The court also ruled, for the second time, that appellant had no standing to raise any claims under the Sixth and Fourteenth Amendments to the Constitution and thus did not reach

the question whether, as construed and applied, the statute contravened the terms of those Amendments (J.A. 94a & n.5).

A notice of appeal to this Court from the judgment of the Supreme Judicial Court was timely filed on September 22, 1981 (J.A. 108a). The appeal was docketed in this Court on September 28, 1981, within 90 days from the date final judgment entered. Probable jurisdiction was noted on November 16, 1981. This Court's jurisdiction rests on 28 U.S.C. § 1257(2), for this is a case in which appellant asserted that M.G.L. ch. 278, § 16A was invalid because repugnant to the Constitution of the United States but the decision of the Supreme Judicial Court was in favor of the statute's validity.

STATUTE INVOLVED.

The text of M.G.L. ch. 278, § 16A is as follows:

> At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

STATEMENT OF THE CASE.

A. *Proceedings in the Superior Court for the County of Norfolk.*

On or about April 19, 1979, hearings on several pretrial motions in a criminal case styled *Commonwealth* v. *Albert Alad-*

jem began before the Honorable Robert V. Mulkern, a judge of the Superior Court for the County of Norfolk who was sitting in Dedham, a town about fifteen miles to the southwest of Boston. When the hearings started, the judge caused a sign reading "Closed" to be placed on the courtroom doors. Persons approaching those doors were told by court attendants that they could not enter while the hearings were in progress (J.A. 61a).

On April 25, 1979, prior to the start of that day's proceedings and prior to the start of the trial itself, counsel to appellant, Globe Newspaper Company (the "*Globe*"), filed with the clerk three motions. First was a motion to revoke any order which the judge had entered concerning exclusion of the press from pretrial or trial proceedings in the *Aladjem* case (J.A. 12a). Second was a motion for a hearing with respect to any closure orders the judge contemplated entering either with respect to pretrial or trial proceedings (J.A. 13a). Third, and finally, was a motion to intervene in the proceedings for the limited purpose of asserting the right of the press to attend them (J.A. 14a).[2]

The trial judge began the day's proceedings by identifying on the record the three motions the *Globe* had filed. Then, immediately after stating that the three victims of the crimes at issue were females sixteen and seventeen years of age and that the defendant was charged with rape and unnatural rape (J.A. 16a-17a), the judge orally issued the following ruling:

> This Court . . . rules that, consistent with General Laws Chapter 278, Section 16A, this trial will be conducted in such a manner that the general public shall be excluded from the courtroom, including the press, and that only

---

[2] This appeal is limited to the order entered by the trial court on April 25, 1979 which excluded the public and the press from the trial itself. No pretrial issues are presented.

such persons as may have a direct interest in the case will be permitted in the courtroom.

(J.A. 17a).

At that point, counsel to the *Globe* asked whether the court had ruled, or was going to rule, on the *Globe's* motion for a hearing with respect to the closure order (J.A. 18a). The judge replied, in essence, that he was not going to rule specifically on that motion because, in his view, the *Globe* had no standing to participate in any fashion in the criminal trial then before him (J.A. 18a). Counsel to Mr. Aladjem, the defendant in the case, then rose to note his exception[3] to the court's ruling excluding the general public and the press from the forthcoming trial (J.A. 18a). With that, the prosecutor rose to state "for purposes of the record" that the exclusionary order just made had not been entered at the request of the Commonwealth (J.A. 18a). The trial judge then cleared the courtroom and the proceedings scheduled for that day resumed (J.A. 18a).

B. ***Proceedings in the Supreme Judicial Court for Suffolk County.***

Several hours after the order quoted above was entered, the *Globe* filed a petition for extraordinary relief pursuant to M.G.L. ch. 211, § 3,[4] in the Supreme Judicial Court for the County of Suffolk to contest the validity of ch. 278, § 16A, the

---

[3] Under Massachusetts practice at the time, noting an exception was the form for making an objection in a manner which preserved it for appellate review. *See* J.A. 18a; W. Leach & P. Liacos, *Handbook of Massachusetts Evidence* 75 (1967).

[4] Filing such a petition constitutes commencement of a new, and not an appellate, proceeding over which the Supreme Judicial Court, and each Justice thereof, has exclusive original jurisdiction. *Id.*

propriety of the exclusionary order the trial judge had entered and the procedure under which that order had been made. The immediate relief sought by the petition was an injunction which, in effect, would have reversed the closure order and permitted members of the press to attend the criminal trial then about to commence (J.A. 8a-11a).

A hearing on the petition was held before a Single Justice of the Supreme Judicial Court on April 26, 1979, the day after the petition was filed. Present at the hearing were counsel to the *Globe*, counsel to the Superior Court for Norfolk County (the "Superior Court") and an Assistant District Attorney responsible for prosecuting the underlying criminal action.[5] After some preliminaries, the Single Justice observed that the procedure employed by the *Globe* the previous day "adequately raised the question whether the *Globe* has any right to have the trial public . . . [i]n the face of the statute." (J.A. 21a).

Then, after argument by counsel to the *Globe* with respect to why the closure order and the statute were invalid (J.A. 20a-27a), the Assistant District Attorney told the court that he was appearing that day "simply as an intervenor, or as amicus to the Court making clear the District Attorney's position in the underlying criminal action." (J.A. 27a-28a). Stating that he was aware of the provisions of § 16A and of what he characterized as the "special privacy interest" the statute afforded to the individuals it described, the prosecutor continued by saying:

> But our position before the trial judge, and . . . this Court, [is] that in some circumstances a trial judge, where the defendant is asserting his right to a constitu-

---

[5] Counsel to the defendant in the criminal proceeding had been notified of the hearing in the Supreme Judicial Court but did not appear because they had been told by the trial judge to be in the trial court that morning (J.A. 29a).

> tional, public trial, a trial judge may consider that as outweighing the otherwise legitimate statutory interests, particularly where the Commonwealth on behalf of the victims, and this is literally on behalf of the victims in the sense that they were consulted fully by the prosecutor in this case [, t]he Commonwealth waives whatever rights it may have to exclude the press.

(J.A. 28a). Summing up his reason for appearing before the Single Justice that day, the prosecutor said "we simply wanted the Court to know that we didn't oppose the access [of] the press in this case." (J.A. 29a).

In light of the prosecutor's statements, the Single Justice, during his ensuing colloquy with counsel to the Superior Court, focused on the issue this case presented to him:

> COURT: . . . . If the prosecutor and defense counsel representing the defendant both want the thing public, and there is no objection from the victims, why . . .
>
> MS. BOTSFORD [Counsel to the Superior Court]: I would have trouble . . .
>
> COURT: Who is the judge protecting?
>
> MS. BOTSFORD: I agree with you that that presents a problem. . . .[6]

(J.A. 32a).

---

[6] Counsel to the Superior Court continued by telling the Single Justice that she had "come into this case reading the papers and having one telephone conversation" with the trial judge and thus did not necessarily know all of his reasons for believing that this particular trial should be closed (J.A. 32a). Later in the hearing, she sought permission to consult further with the trial judge to determine the particular reasons, if any, he had (J.A. 36a). The Single Justice declined. While observing that jury selection had been postponed until the following day and that "we are not under any particular gun," he said: "Obviously, they are trying to expedite the trial of that case. And I think it can go forward either with, or without the press and I am not disposed to delay things." (J.A. 36a-37a).

At the conclusion of the hearing that morning, the Single Justice ruled orally that M.G.L. ch. 278, § 16A was "mandatory in its terms" (J.A. 41a), and that, even if not "utterly mandatory" (J.A. 41a), there had been no showing that the trial judge had abused his discretion by closing the trial (J.A. 41a). The Single Justice also ruled that the *Globe* had no First-Amendment right to attend the trial and that it had no standing to raise any Sixth-Amendment contentions (J.A. 41a-42a). Finally, the Single Justice ruled that, if the First Amendment required a hearing, that requirement had been satisfied, "although rather summarily," by the hearing held on the question whether the *Globe* should be permitted to intervene. "I take it," the Single Justice said, "that not a great deal of argument was permitted on that. But, it is not clear to me that much had to be said." (J.A. 42a). A written order denying the *Globe's* petition was entered later the same day (J.A. 43a), and final judgment dismissing the petition was entered 11 days later (J.A. 44a).

After the Single Justice entered his order of April 26 denying the *Globe's* petition, the jury in the underlying criminal action was impaneled and the case was tried. On May 10, the jury returned a verdict of not guilty, and Mr. Aladjem was acquitted (J.A. 47a). The trial was closed to the press and to the public throughout its course (J.A. 91a).[7]

---

[7] By agreement of the parties, the record discusses two events which took place after the trial began. The first was a lobby conference attended by the trial judge and the prosecutor. The record does not indicate whether defense counsel were present, and counsel for the *Globe* were not. The prosecutor said she had spoken again to the victims about the ruling excluding the press. According to the prosecutor, the victims had "concerns" about whether the press would print their names, where they went to school, pictures of them, personal data concerning them or whether members of the press would attempt to interview them. Those concerns according to the prosecutor, came "from their own privacy interests, as well as the fact that there are grandparents involved with a couple of [the] victims who do not know what hap-

C. *The First Appeal: Globe I.*

On May 17, 1979, the *Globe* filed its notice of appeal to the Supreme Judicial Court for the Commonwealth from the judgment dismissing its petition the Single Justice had entered ten days earlier. On February 26, 1980, the Supreme Judicial Court affirmed that judgment. *Globe Newspaper Co.* v. *Superior Court*, Mass. Adv. Sh. (1980) 485, 401 N.E.2d 360 (hereinafter referred to as "*Globe I*").

In its opinion, the Supreme Judicial Court held that the issues raised before the Single Justice were moot because the criminal trial had ended. Nevertheless, the court held, those issues were "significant and troublesome, and . . . 'capable of repetition yet evading review'." (J.A. 60a). Thus, while dismissing the *Globe's* appeal on the ground of mootness, the Supreme Judicial Court deemed it appropriate to express its views on the issues the appeal raised (J.A. 60a).

The court did not, however, address the constitutional claims raised by the *Globe*. Although it acknowledged that those claims had been raised, it said it would await this Court's decision in the then pending case of *Richmond Newspapers, Inc.* v. *Virginia* for their resolution (J.A. 67a).

Proceeding solely on the basis of statutory construction, the court ruled that the members of the press assigned to cover a given trial were not persons with a "direct interest in the case"

---

pened and if they were to find out by reading it in the paper, everyone was concerned about what would happen to them." (J.A. 48a). The prosecutor continued by saying that if some guarantee could be obtained that "this information" would not be used, the victims "wouldn't object to the press being included." (J.A. 48a). The record contains no suggestion that that information ever was communicated to the press or public. The second event was publication in a local newspaper of a two-part article by a juror in the case concerning her experience as a juror and why the jury reached the result it did (J.A. 49a-57a). Although the record contains no mention of any strictures placed by the trial judge on what jurors could or could not say about the case, the article did not identify the victims (J.A. 49a).

as that term was used in the statute (J.A. 77a), and that the word "shall" contained in the statute was mandatory, not simply directory (J.A. 75a). The court then ruled that § 16A required exclusion of the press and public from trials the statute covered while the minor victims were testifying (J.A. 77a). Rejecting an interpretation of the statute proffered by counsel to the Superior Court, the court held that the mandatory closure provision of the statute could not be waived by the victim or by anyone else (J.A. 74a n.21).

After entry of the Supreme Judicial Court's affirming judgment, the *Globe* appealed to this Court. After that appeal had been docketed, and while it was pending, this Court rendered its opinion in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), holding that the First Amendment to the Constitution of the United States guarantees the right of the public to attend criminal trials. Three months later, on October 14, 1980, this Court vacated the Supreme Judicial Court's judgment and remanded the case for further consideration in light of *Richmond Newspapers*. 449 U.S. 773 (1980) (J.A. 88a).

D. *The Second Appeal: Globe II.*

The judgment of the Supreme Judicial Court on remand was entered June 30, 1981. *Globe Newspaper Co.* v. *Superior Court*, Mass. Adv. Sh. (1981) 1493, 423 N.E.2d 773 (hereinafter referred to as "*Globe II*"). After holding that the case was not moot as to First-Amendment issues (J.A. 93a n.4), the court ruled that this Court's remand order did not require reconsideration of claims raised by the *Globe* under the Sixth Amendment. As a result, the court reiterated the conclusion it had expressed in *Globe I* that the *Globe* had no standing to assert them (J.A. 94a n.5).

The Supreme Judicial Court then held that § 16A in its mandatory aspect did not violate the *Globe's* First-Amendment rights as those rights had been articulated by this Court in *Richmond Newspapers* (J.A. 105a).[8] The court's decision was based in large part on what it found were state interests underlying what it viewed as a "notable exception" to the unbroken tradition of public trials in the United States, an exception for the trial of cases involving sexual assaults (J.A. 98a). The relevant state interests were, in essence, those the court had identified in *Globe I*, *i.e.*, sparing minor victims the embarrassment of public testimony and promoting the sound and orderly administration of justice by encouraging minor victims of sexual assaults to come forward and give credible testimony (J.A. 101a).

The Supreme Judicial Court also reiterated its holding that, although § 16A might appear designed to protect the minor victims of certain assaults, a minor victim who desired to testify in open court could not "waive" the statute's provisions and thus that a trial the statute governed must proceed in part behind closed doors even if the victim objected (J.A. 102a n.15; *see* J.A. 74a n.21). Because the statute said nothing about public release of transcripts of the victim's testimony, however, the court left that to the "sound discretion of the trial judge" exercised in accordance with *Globe I*, *Globe II* and *Richmond Newspapers* (J.A. 101a n.14).

Justice Wilkins, one of the five members of the panel which heard the case on remand, concurred specially for the purpose of stating his doubts that, in its mandatory aspect, § 16A was constitutional. He questioned whether "findings, imputed to

---

[8] The court said, however, that the conclusion it reached required "a close reading" of *Richmond Newspapers* (J.A. 94a), and referring to that decision, the Court expressed "some difficulty in determining the binding rule of law in a decision which lacks reasoning to which a majority of the Court has agreed." (J.A. 95a n.8).

the legislature, in support of closing . . . trials [covered by § 16A] can alone justify closing a portion of all such trials." (J.A. 107a). Believing that imputed legislative findings were not necessarily applicable to each case and using the example of a minor victim who wanted the public to know precisely what a heinous crime the defendant had committed, Justice Wilkins would have construed § 16A as entirely permissive and would have required specific findings before closure, in whole or in part, of any trials comprehended by the statute was permitted (J.A. 107a).

SUMMARY OF ARGUMENT.

This Court's decision in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), squarely held that the First Amendment to the Constitution of the United States, as applied to the states through the Fourteenth Amendment, embodies a right to attend criminal trials. To be sure, no opinion rendered by any of the justices who participated in *Richmond Newspapers* commanded majority support. The question or questions over which the opinions divided, however, did not concern the central question whether the First Amendment guarantees public observation of criminal trials. Instead, the opinions divided over the route to be taken in order to reach an affirmative answer to the central question and, perhaps, over that answer's portent for future cases.

Whatever the ultimate limits of the basic principle established by *Richmond Newspapers* — and this is not a case which tests those limits — agreement that the First Amendment preserves the right to observe criminal trials necessarily spawns agreement to a number of subsidiary principles, principles which mandate reversal of the judgment below. Those principles, discussed in detail in Part I(A) of this Brief, are that

the Legislature cannot have the final word on when closure is appropriate, that the interests necessary to support a valid closure order must be overriding or compelling, that a clear and direct nexus between those interests and the specific closure sought must be demonstrated at a hearing by the party who seeks the order, that the order must be exactingly crafted to achieve the overriding governmental interest in question but no more, and that the order entered must in fact preserve the governmental interest asserted.

For the reasons described in Part I(B), neither Massachusetts General Laws, ch. 278, § 16A, nor the closure order entered in this case is congruent with the principles just mentioned. Ultimately, the statute, and the closure order entered pursuant to it, rest on what was described by the Supreme Judicial Court as a "notable exception" to the unbroken history of open public trials, an exception which broadly comprehends all trials of female victims of sexual assaults. But there is no such exception and certainly no such exception which gives rise to a prophylactic barrier like that embodied in § 16A. Nor can the closure wrought by § 16A in general or by the order entered pursuant to that statute in this case be viewed as a *de minimis* infringement of the First-Amendment rights possessed by the press and the public. Finally, the interests arrayed in support of the statute, both in general and as applied to the case at hand, simply do not meet the minimum criteria for a valid restraint on exercise of First-Amendment rights.

Part II of this Brief discusses the Sixth Amendment, for, in addition to invading upon rights preserved by the First Amendment, § 16A also trenches on rights protected by the Sixth Amendment to the Constitution. While this Court's opinion in *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979), may be read to say that the public never has standing to enforce Sixth-Amendment guarantees, *Gannett* involved a pre-

trial hearing, not a trial. Moreover, in this case, unlike *Gannett*, the defendant affirmatively sought an open and public trial. Given the symbiotic relationship between a defendant who desires a public trial and the public which desires to attend that trial — a symbiotic relationship which lies at the very heart of the Sixth-Amendment guarantees — standing on the part of the public to assert a right to observe a trial like the one involved in this case should be recognized.

Given the specific and focused guarantees of the Sixth Amendment, given the principles which underlie those guarantees and given the unbroken course of history during which those principles and guarantees uniformly have been observed, nothing short of the most compelling necessity imaginable should serve to support exclusion of the public from the trial of a criminal case. Certainly no legislative judgment simply removing certain portions of certain trials from the public view should be permitted to close courtroom doors. In this case, however, that is precisely what happened.

ARGUMENT.

I. Massachusetts General Laws, ch. 278, § 16A as Construed by the Supreme Judicial Court and as Applied in This Case Violates the First Amendment to the Constitution of the United States as Applied to the States Through the Fourteenth Amendment.

A. *The First Amendment Right to Attend Criminal Trials Strongly Presumes that Such Trials Must Be Open in Their Entirety.*

This is a case in which part of a trial was closed *solely* because of a legislative judgment made fifty years ago that evi-

dence presented at trial by certain victims of certain crimes was something no member of the public should ever see.[9] No one asked that this trial be closed. The defendant objected to closure and, through the prosecutor, the victims, whose names were part of the public record of the case (J.A. 103a), expressly disavowed any insistence on it. Although a hearing on the question of closure was timely sought, no hearing was held. The courtroom doors were simply shut. And, the opinion below decrees, that scenario must repeat itself each time a case like this one is called for trial in the future.

Yet two terms ago, in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), this Court held that the First Amendment to the Constitution, as applied to the states through the Fourteenth Amendment, preserves the right of the press and the public to attend the trial of criminal cases. Although no single opinion was embraced by a majority, the basic theme to which all but one of the participating members of this Court subscribed was that

> the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated."

Richmond Newspapers, 448 U.S. at 580, quoting *Branzburg* v. *Hayes*, 408 U.S. 665, 681 (1972).

To be sure, none of the opinions rendered in *Richmond Newspapers* stated that the rights there described were ab-

---

[9] As originally enacted in 1923, the statute applied only to those "under 17 years of age" and provided for discretionary closure in the Superior Court. 1923 Mass. Acts. ch. 251. The present version of the statute was adopted in 1931. 1931 Mass. Acts. ch. 205. It has not been amended since.

solute. The plurality opinion, however, did indicate that the standard for closure should be high indeed and that the decision to close a trial should be made by trial judges on a case-by-case basis. As the plurality opinion put it, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Id.* at 581. Several of the concurring opinions, expressly or by implication, also averted to the very limited circumstances under which closure would be appropriate. Justice Brennan, for example, while declining to explore in depth those interests which might be "sufficiently compelling to reverse [the] presumption of openness" of criminal trials, said that testimony about "state secrets" during "sensitive portions" of trial proceedings may "sometimes warrant" partial closure of those proceedings. *Id.* at 598 & n.24. Justice Blackmun, while observing that "uncertainty marks the nature — and strictness — of the standard of closure" compelled by the First Amendment, took pains to note, as he had earlier in the partial dissent he authored in *Gannett*, the public's "intense need and . . . deserved right to know about" the administration of justice, the prosecution of local crimes, the conduct of the trial participants and the trial itself. *Id.* at 604. The inescapable logic of his position thus seems to be that no less intense and compelling need will suffice to permit closure of any criminal trial.[10]

The absence of a unified description of the boundaries of the First-Amendment right recognized in *Richmond Newspapers* is perhaps more a product of structure and emphasis than it is reflective of fundamental disagreement over the parameters of the right there recognized. But to reach the basic conclusion

---

[10] While Justice Stewart suggested that the "sensibilities of a youthful prosecution witness . . . might justify [exclusion from at least some segment of] a criminal trial for rape", he qualified that suggestion with the important proviso that "the defendant's Sixth Amendment right to a public trial . . . not [be] impaired." *Id.* at 600 n.5.

that there is a First-Amendment right to attend criminal trials, when that conclusion is viewed against the backdrop of this Court's prior decisions concerning what it is the First Amendment preserves, is surely to conclude that trials cannot be closed to the press and public unless certain basic criteria have been met. In the aggregate, those criteria may not mark the outer limits of First-Amendment protection to attend criminal trials. They do, however, provide an irreducible minimum, and they are sufficient to demonstrate the error of the judgment below.

The first of those criteria is the principle that decisions with respect to closure must be made on a case-by-case basis. That much is implicit in the notion expressed by the *Richmond Newspapers* plurality that the overriding interest necessary to support closure must be "articulated in *findings*." *Richmond Newspapers*, 448 U.S. at 581 (emphasis added). *See also Revised Report of the Judicial Conference Committee on the "Free Press-Fair Trial" Issue*, 87 F.R.D. 519, 524 (1980). More fundamentally, the role of the legislature, representing as it does the mechanism for implementing majority will, is a limited one where counter-majoritarian rights like those recognized by the First Amendment are concerned. *See generally Katzenbach* v. *Morgan*, 384 U.S. 641, 651 n.10 (1966); *Thornhill* v. *Alabama*, 310 U.S. 88, 95-96 (1940); *United States* v. *Carolene Products*, 304 U.S. 144, 152 n.4 (1938); The Federalist No. 78 (A. Hamilton) at 524-25 (Heritage ed. 1945). Where, as here, a restraint on exercise of activity presumptively embraced by the First Amendment is triggered by the content of that activity, the restraint, if valid at all, is valid only if and to the extent that facts showing its necessity are demonstrated. *E.g.*, *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 785-86 & n.22 (1978); *Police Department of Chicago* v. *Moseley*, 408 U.S. 92, 95-96 (1972); *Wood* v. *Georgia*, 370 U.S. 375, 386-88 (1962); *Bridges* v. *Cali-*

fornia, 314 U.S. 252, 271 (1941). Because the simple enactment of a statute cannot alone establish those facts, it is incumbent upon the court to determine for itself in each case whether or not they exist. *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 844 (1978); *Whitney* v. *California*, 274 U.S. 357, 374, 378-79 (1927) (Brandeis, J., concurring); *Globe II* (J.A. 107a) (Wilkins, J., concurring). *Compare, e.g., Gitlow* v. *New York*, 268 U.S. 652, 668 (1925) *with, e.g., Brandenburg* v. *Ohio*, 395 U.S. 444, 446-47 (1969). Any other view would mean that "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 844 (1978). *See* The Federalist No. 78 (A. Hamilton) at 524-25 (Heritage ed. 1945).

A second principle is that those who seek entry of an order expelling the press and public from trial proceedings must bear the burden of showing that such an order is warranted. In a sense, that principle reflects the common rule that the litigant who seeks to alter the *status quo* bears the burden of showing that alteration is proper. More important, however, placing that burden on the party who seeks to constrict exercise of First-Amendment rights minimizes the risk of erroneous fact-finding — a risk inherent in all litigation — and thus the likelihood that mistakes will result in improper restriction of rights the First Amendment preserves. *Speiser* v. *Randall*, 357 U.S. 513, 525-26 (1958). *See New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271 (1964); *Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967). *See generally Gannett*, 443 U.S. at 401 (1979) (Powell, J., concurring).

Third, the interest asserted in support of trial closure must be an interest which is "overriding" or "compelling". *Richmond Newspapers*, 448 U.S. at 581 (opinion of Burger, C. J.), 598 (Brennan, J., concurring). *See Sherbert* v. *Verner*, 374

U.S. 398, 403 (1963); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). That principle is but a logical derivative of the proposition that First Amendment rights are themselves fundamental because, both in general and in the context of a criminal trial, they provide "those opportunities for public education that are essential to the power of correcting error through the processes of popular government". *Thornhill* v. *Alabama*, 310 U.S. 88, 95 (1940). *See generally Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-93 (1975); A. Meiklejohn, *Free Speech and Its Relation to Self-Government* 26 (1948); 9 *Writings of James Madison* 103 (G. Hunt ed. 1910). As a matter of logic, to say nothing of sound analysis of the very form of government under which we live, it is mistaken to assume that those rights can be overborn in the absence, at the very least, of a showing that equally compelling interests are in competition with them.

Fourth, in each case there must be, at the least, a demonstrated, clear and direct nexus between the asserted state interest and the specific closure order sought. That much, too, was implicit in the *Richmond Newspapers* plurality's requirement that the interest in question be "articulated in findings." *Richmond Newspapers*, 448 U.S. at 581. More fundamentally, this Court never has countenanced prophylactic schemes designed to ward off vague and shadowy perceptions of possible harm when those schemes have done so at the expense of First-Amendment rights. "Undifferentiated fear or apprehension," in sum, never has been recognized as a valid predicate for curtailment of rights the First Amendment preserves. *Tinker* v. *Des Moines Independent School Dist.*, 393 U.S. 503, 508 (1969). *See, e.g., Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U.S. 620, 636 (1980); *Gibson* v. *Florida Legislative Committee*, 372 U.S. 539, 546, 550 (1963);

NAACP v. *Alabama ex rel. Patterson*, 357 U.S. 449, 464-65 (1958).[11]

Fifth, any order closing all or a portion of a criminal trial must be the least restrictive order available to deal effectively with the subordinating governmental interests marshaled in its support. That principle has been an essential ingredient of this Court's First-Amendment decisions in virtually every context. *E.g.*, *Metromedia, Inc.* v. *City of San Diego*, 101 S.Ct. 2882, 2892 (1981); *Schad* v. *Borough of Mount Ephraim*, 101 S.Ct. 2176, 2183 n.7 (1981); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 786 (1978); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213 (1975); *United States* v. *O'Brien*, 391 U.S. 367, 381 (1968); *Shelton* v. *Tucker*, 364 U.S. 479, 488-89 (1960); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). The

---

[11] Given the importance of the public right to attend the trial of criminal proceedings, the *Globe* strongly urges that the relevant nexus should be one of inescapable necessity. *See Gannett*, 443 U.S. at 400 (Blackmun, J., concurring in part and dissenting in part). In each case, then, the question should be whether the specific closure order sought is inescapably necessary in order to achieve a fair and just resolution of the case then on trial. *See* pp. 29-30, *infra*. As a secondary position, the *Globe* urges that the "clear and present danger" standard, at least as that standard is explained in *Craig* v. *Harney*, 331 U.S. 367, 376 (1947) and in *Whitney* v. *California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring), provides the appropriate nexus. *See generally* Strong, *Fifty Years of "Clear and Present Danger": From Schenck to Brandenburg and Beyond*, 1969 Sup. Ct. Rev. 41, 64-80. Indeed, that standard has been suggested in a number of contexts. *E.g.*, *In re P.R.*, 7 Med. L. Rep. 2277 (Colo. 1981); *ABA Standards for Criminal Justice, Fair Trial & Free Press* 8-3.2 (pretrial proceedings), 8-3.6(d) (trial proceedings out of the presence of the jury). *But see Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 87 F.R.D. 519, 535 (1980) (pretrial proceedings); *Gannett*, 443 U.S. at 399-400 (Powell, J., concurring) (pretrial proceedings). It is not necessary, however, to decide in this case whether either of those standards provides the appropriate nexus between the apprehended danger and the closure order sought for, as will be discussed, there was no demonstrated, clear and direct nexus of any kind between any of the state interests asserted here and the closure order which in fact resulted.

requirement that the means chosen be precisely tailored to avoid prohibiting anything more than is absolutely essential to achieve the interest in question stems from the fact that the First-Amendment rights in question are themselves the object of paramount concern and thus may not be overborn by notions of expedience or easy enforcement. Simply put, adjustment of competing and compelling interests calls for the use of "sensitive tools," *Speiser* v. *Randall*, 357 U.S. 513, 525 (1958), for an order closing a criminal trial "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order." *Carroll* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968). A meat-axe just may not be used where a scalpel will suffice.

Sixth, there must be a determination that the closure order will be effective to preserve the asserted interest. Without such a determination, there can be absolutely no assurance that that interest is in fact compelling. *See Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 110 (1979) (Rehnquist, J., concurring). Indeed, given the proposition that rights preserved by the First Amendment are predominant unless and until forced to give way in specific and narrow circumstances to interests which have even greater claim for recognition, it makes absolutely no sense to abridge those rights if abridgement, in the end, would be an exercise in futility. *See Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 565-67 (1976); *New York Times Co.* v. *United States*, 403 U.S. 713, 733 (1971) (White, J., concurring). To conclude otherwise would be to conclude that the government may compel surrender of rights retained by the people under the First Amendment in its pursuit of clearly unreachable goals.

Seventh, and finally, in order to ensure that the principles just described are properly and carefully applied, an order closing all or part of a criminal trial must be preceded by a

hearing and must be accompanied by findings. *Richmond Newspapers*, 448 U.S. at 581; *Gannett*, 443 U.S. at 400-01 (Powell, J., concurring), 445-46 (Blackmun, J., concurring in part and dissenting in part); *cf. Gannett*, 443 U.S. at 393-94. In the absence of a hearing a "court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate." *Carroll* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1969). Failure to hold a hearing thus "reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the [First] Amendment seeks to assure." *Id.* at 184. *See also Freedman* v. *Maryland*, 380 U.S. 51, 58-59 (1965); Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 524-25 (1970).[12]

The principles just canvassed, although not necessarily exhaustive, illustrate the error of the judgment below. M.G.L. ch. 278, § 16A forbids case-by-case consideration and it forbids, or at least makes meaningless, a hearing prior to closure. The statute requires no showing in any given case that a compelling governmental interest would be served by closure, that closure is the least drastic means for pursuing that interest or that closure will work. It requires closure even where, as

---

[12] The necessity for a hearing is reflected in each reported decision concerning closure of a trial after this Court's decision in *Richmond Newspapers: Sacramento Bee* v. *United States District Court*, 656 F.2d 477 (9th Cir. 1981); *In re United States ex rel. Pulitzer Publishing Co.*, 635 F.2d 676 (8th Cir. 1980); *In re P.R.*, 7 Med. L. Rep. 2277 (Colo. 1981); *State* v. *Sheppard*, 7 Med. L. Rep. 1140, ___A.2d___ (Conn. 1980); *United States* v. *Edwards*, 7 Med. L. Rep. 1324, ___A.2d___ (D.C. 1981); *State* v. *Green*, 395 So.2d 532 (Fla. 1981); *Ashland Publishing Co.* v. *Asbury*, 612 S.W.2d 749 (Ky. App. 1980); *People* v. *March*, 95 Ill. App. 3d 46, 419 N.E.2d 1212 (1981); *Patuxent Publishing Corp.* v. *State*, 429 A.2d 554 (Md. 1981); *Detroit Free Press* v. *Recorder's Court Judge*, 409 Mich. 364, 294 N.W.2d 827 (1980); *State* v. *Sinclair*, 274 S.E.2d 411 (S.C. 1981); *State* v. *Wahle*, 298 N.W.2d 795 (S.D. 1980).

here, closure is sought by no one. Indeed, it permits no one, ever, under any circumstances, to waive the protections it purports to afford. As will be demonstrated momentarily, the Supreme Judicial Court's conclusion that the statute was congruent with the First Amendment, those defects notwithstanding, cannot itself withstand analysis.

B. *As Construed and Applied by the Supreme Judicial Court, M.G.L. ch. 278, § 16A Violates the First Amendment Guarantee that Criminal Trials Will Be Open to Public Observation.*

In its opinion in *Globe II*, the Supreme Judicial Court held that, to determine the constitutionality of the mandatory closure requirement of § 16A, a three-fold inquiry was necessary. That inquiry, in the court's view, required it to examine: (1) whether closing the courtroom during the testimony of the minor victim of a sexual assault violated the same tradition of open proceedings as the closing of an entire murder trial; (2) whether closure impeded the flow of information necessary to the functioning of democratic institutions; and (3) whether there were substantial state interests underlying § 16A which could not be furthered by more tightly-drawn regulations intruding to a lesser degree on the constitutionally protected interests of the press and public (J.A. 98a).

The first two inquiries in which the Supreme Judicial Court engaged, however, were not the appropriate inquiries in light of the principles discussed above. The outcome of the court's analysis with respect to the third inquiry reflects, at bottom, the court's misapprehension of the criteria which an order closing the trial of criminal cases must meet.

1. There Is No Exception to the First Amendment Which Permits Routine Closure of a Criminal Trial on the Basis of Subject-Matter Alone.

In analyzing the first question, relating to the role of tradition, the Supreme Judicial Court concluded that trials of crimes involving sexual assaults were a "notable exception" to the "unbroken tradition of openness" which inheres in the trial of other crimes (J.A. 98a). The court's reliance on a perceived exception to the historic tradition of open trials misses the point established in *Richmond Newspapers* and misapprehends the strength and nature of that tradition as well.

It is certainly true that all opinions in *Richmond Newspapers*, as well as all opinions in *Gannett*, reviewed in some detail the presumption of openness which historically has attended the trial of criminal cases. Ultimately, however, it was the "*constitution* that [the Court] was expounding." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original). While history may help shape the meaning of the Constitution as applied to a current problem, surely history does not freeze constitutional rights in a mold formed by prior years. *See, e.g., Brown* v. *Board of Education*, 347 U.S. 483 (1954); A. Bickel, *The Least Dangerous Branch* 108-10 (1962); B. Cardozo, *The Nature of the Judicial Process* 76-88 (1921). This is not to say that history is irrelevant but simply that it is not dispositive in current interpretation of constitutional rights.

Moreover, to give a "notable exception" the weight to which it is entitled in forming current judgments, it is necessary to have an accurate understanding of what that exception is. Statutes and judicial decisions of numerous states do in fact *permit*, and for years have *permitted*, a trial judge to exclude the press and public from portions of certain types of criminal trials, including trials of crimes involving sexual assaults. Even

prior to this Court's decision in *Richmond Newspapers*, however, those statutes and cases were uniformly permissive only.[13] Those statutes and cases, far from carving out some

---

[13] *See, e.g.*, authorities cited in *Gannett*, 443 U.S. at 388 n.19. In addition to the discretionary statutes of Alabama, New York and North Carolina cited by the Supreme Judicial Court in *Globe II* (J.A. 100a n.12), at least two other states have constitutional provisions or statutes of similar import permitting discretionary closure of trials of crimes involving sexual assaults. Ga. Code § 81-1006; Miss. Const. § 26. Several other states have statutes or rules of court, not limited in operation to crimes involving sexual assaults, which allow discretionary closure of trials in appropriate cases. Ariz. R. Crim. Pro. 9.3(c); Vt. Stat. Ann. tit. 12, § 1901; Va. Code § 19.2-266 (at issue in *Richmond Newspapers*). At least nineteen other states have appellate case authority holding that a trial judge may, in the exercise of his discretion and in an appropriate case, exclude the public and, in some cases, the press from portions of trials of crimes involving sexual assaults. *Hogan* v. *State*, 191 Ark. 437, 86 S.W.2d 931 (1935); *State* v. *Purvis*, 157 Conn. 198, 251 A.2d 178 (1968), *cert. denied sub. nom. Purvis* v. *Connecticut*, 395 U.S. 928 (1969) (*but see State* v. *Sheppard*, 7 Med. L. Rev. 1140, ___ A.2d ___ (Conn. 1980)); *Bivins* v. *State*, 313 So.2d 471 (Fla. App. 1975); *Beauchamp* v. *Cahill*, 297 Ky. 505, 180 S.W.2d 423 (1944) (*but see Lexington Herald Leader* v. *Tackett*, 601 S.W.2d 905 (Ky. 1980)); *People* v. *Latimore*, 33 Ill. App. 3d 812, 342 N.E.2d 209 (1975); *Marshall* v. *State*, 254 Ind. 156, 258 N.E.2d 628 (1970); *State* v. *Croak*, 167 La. 92, 118 So. 703 (1928); *State* v. *Callahan*, 100 Minn. 63, 110 N.W. 342 (1907); *Riley* v. *State*, 83 Nev. 282, 429 P.2d 59 (1967); *State* v. *Blake*, 113 N.H. 115, 305 A.2d 300 (1973); *State* v. *Padilla*, 91 N.M. 800, 581 P.2d 1295 (1978); *State* v. *Nyhus*, 19 N.D. 326, 124 N.W. 71 (1909); *Commonwealth* v. *Stevens*, 237 Pa. Super. 457, 352 A.2d 509 (1975); *State* v. *Santos*, 413 A.2d 58 (R.I. 1980); *State* v. *Sinclair*, 274 S.E.2d 411 (S.C. 1981); *State* v. *Damm*, 62 S.D. 123, 252 N.W. 7 (1933); *Price* v. *State*, 496 S.W.2d 103 (Tex. Crim. App. 1973); *State* v. *Smith*, 90 Utah 482, 62 P.2d 1110 (1936); *State* v. *Holm*, 67 Wyo. 360, 224 P.2d 500 (1950). Seven other states have appellate cases which suggest the same result but do not so hold on the facts presented. *Kirstowsky* v. *Superior Court*, 143 Cal. App. 2d 745, 300 P.2d 163 (1956); *Lecates* v. *Lecates*, 38 Del. 190, 190 A. 294 (1937); *Des Moines Register & Tribune Co.* v. *Hildreth*, 181 N.W.2d 216 (Iowa 1970); *Detroit Free Press* v. *Recorder's Court Judge*, 409 Mich. 364, 294 N.W.2d 827 (1980); *State* v. *Hensley*, 75 Ohio St. 255, 79 N.E.2d 462 (1906); *State* v. *Osborne*, 54 Or. 289, 103 P.2d 62 (1909); *Neal* v. *State*, 86 Okla. Crim. 283, 192 P.2d 294 (1948). *See generally* Annot., 39 A.L.R.3d 852; note 16 *infra*.

blanket exception to the rule that trials must be public, invite, if indeed they do not demand, focused attention by the trial court on the application of general governmental interests to the facts at hand before an order closing all or part of a criminal trial may be entered.[14]

The authorities cited by the Supreme Judicial Court in *Globe II* as evidence of the "notable exception" are not to the contrary. At most, they give rise to the conclusion that under some circumstances a trial may be closed in whole or in part to the press or public, a conclusion with which, at least in the abstract, the *Globe* does not quarrel (J.A. 100a & n.12). None of the cases cited by the court involved mandatory closure of all or certain portions of a trial. In each case, closure resulted from an exercise of discretion on the part of the trial court.[15] The same is true with respect to the three state statutes cited

---

[14] Some state statutes do require exclusion of *minors* from certain criminal trials unless it is necessary for them to be present. *E.g.*, Vt. Stat. Ann. tit. 12, § 1901. *But see* M.G.L. ch. 220, § 13A. Those statutes, however, rest on very particular grounds and cannot be viewed as a springboard for "traditional" exclusion of adults. *See generally Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

[15] Noteworthy also is that the cases cited by the court call into question the very existence of any exception to the rule of openness, at least as that exception applies to the *Globe*. In three of the six cases cited by the court for the proposition that there is an exception to the tradition of openness for trials of crimes involving sexual assaults, the press was allowed to remain despite the exclusion of members of the general public. *United States ex rel. Latimore* v. *Sielaff*, 561 F.2d 691 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978); *Douglas* v. *State*, 328 So.2d 18 (Fla.), *cert. denied*, 429 U.S. 871 (1976); *Price* v. *State*, 496 S.W.2d 103, 107-08 (Tex. Crim. App. 1973). Indeed, the very first case decided by the Supreme Judicial Court involving § 16A was a case in which the general public was excluded from the courtroom during the course of the trial but the press was allowed to remain. *Commonwealth* v. *Blondin*, 324 Mass. 564, 572, 87 N.E.2d 455 (1949), *cert. denied*, 339 U.S. 984 (1950).

by the court — each is permissive and none is mandatory.[16] Indeed, no mandatory statute like § 16A exists elsewhere in the United States today. There is, in sum, no "notable exception" to the history of open trials which uniformly and without leeway requires exclusion of the public from any part of a trial of a sexual offense.

2. The Statute Does Not Have a *De Minimis* Impact on Rights Guaranteed by the First Amendment.

The Supreme Judicial Court answered the second question it posed, *i.e.*, whether the mandatory closure required by § 16A impedes the flow of information necessary to the functioning of democratic institutions, by concluding that the impediment undoubtedly flowing from closure was offset by the general ability of the public to observe trials of sex-related crimes which did not involve minors (J.A. 100a-101a). In essence, then, the court concluded that partial closure in cases like this one had a *de minimis* impact on the flow of information necessary for the sound operation of a democracy because of the general availability of different information elsewhere.

To draw such a conclusion is to enter dangerous territory. With good reason has this Court expressed serious reservation about the wisdom of committing to the "conscience of judges" the task of determining what information is or is not relevant to democratic institutions. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339 (1974). Instead, this Court consistently has interpreted the First Amendment broadly to protect traffic in all ideas "regardless of their social worth," *Stanley* v. *Georgia*,

---

[16] Ala. Code § 12-21-202 (1975); N.Y. Jud. Law § 4 (1975); N.C. Gen. Stat. § 15-166 (1975). The validity of these statutes and the statutes and cases cited in note 13 *supra*, may well be open to question after this Court's decision in *Richmond Newspapers* to the extent that they contain no standards to inform exercise of the discretion they purport to confer. *See Richmond Newspapers*, 448 U.S. at 598 (Brennan, J., concurring).

394 U.S. 557, 564 (1969), and has expressed the view that "the state may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold* v. *Connecticut*, 381 U.S. 479, 482 (1965). Neither the fact that some believe the information at issue has negligible social utility, *e.g.*, *Spence* v. *Washington*, 418 U.S. 405, 410 (1974); *Gooding* v. *Wilson*, 405 U.S. 518, 528 (1972); *Cohen* v. *California*, 403 U.S. 15, 26 (1971); nor the fact that other opportunities for exchange of information are unaffected by the governmental restraint in question, *e.g.*, *Schneider* v. *State*, 308 U.S. 147, 163 (1939); *cf. Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1975), ever has provided a foundation for a blanket denial of a right to exercise First-Amendment freedoms.

Beyond that, however, the restraint imposed by § 16A is not, by any stretch of the imagination, a *de minimis* restraint. At the trial of any criminal case, the testimony of the victim is the most important evidence likely to be offered. It is, very often, the testimony of the victim, and the victim alone, that determines whether a crime has been committed. It is the testimony of the victim, quite often, that determines whether or not the accused was the perpetrator of a crime undoubtedly committed. It is the testimony of the victim with respect to the degree of force used in commission of the crime which makes comprehensible and intelligible the sentence awarded after conviction. As a result, the right to observe a criminal trial without the right to observe the victim's testimony is much like the right to harvest all of the wheat that grows in the desert.

Moreover, nothing can substitute for the loss engendered by closing the victim's testimony to public view. Transcripts of that testimony cannot suffice, for transcripts at best capture imperfectly and belatedly the words the victim used while testifying and capture none of the non-speech elements of the evidence he or she presents. *See generally Richmond News-*

papers, 448 U.S. at 597 n.22 (Brennan, J., concurring); *Gannett*, 443 U.S. at 442 n.17 (Blackmun, J., concurring in part and dissenting in part); *NLRB* v. *Dinion Coil Co.*, 201 F.2d 484, 487-90 (2d Cir. 1952); *State ex rel. Dayton Newspapers, Inc.* v. *Phillips*, 46 Ohio St. 2d 457, 351 N.E.2d 127, 136 (1976) (Stern, J., concurring). Observation of other trials for crimes involving sexual assaults cannot do it, for satisfaction that justice was done yesterday in some other case carries with it no assurance that justice is being done today in the case now on trial. Finally, second-hand accounts of the testimony given by the witness are, by definition, only approximations of what went on at trial, and given the identity of those permitted by § 16A to attend, are accounts quite likely to be refracted by the prism of self-interest. *See generally Commonwealth* v. *Marshall*, 356 Mass. 432, 253 N.E.2d 333 (1969); J.A. 54a-57a.

3. The Interests Identified by the Supreme Judicial Court Are Insufficient to Require Closure of All Testimony of All Victims at All Trials Comprehended by M.G.L. ch. 278, § 16A.

The third and final inquiry engaged in by the Supreme Judicial Court was whether § 16A served "substantial state interests" which could not be furthered by more tightly drawn regulations intruding to a lesser degree on the constitutionally protected rights of the press and public (J.A. 98a). The court found that § 16A furthered the following five interests, interests which it had previously identified in *Globe I*: (1) encouraging minor victims of sexual assaults to come forward to institute complaints and give testimony; (2) protecting minor victims of certain sex crimes from "public degradation, humiliation, demoralization, and psychological damage"; (3) enhancing the likelihood of credible testimony from minors, free of confusion, fright or embellishment; (4) promoting the sound and orderly administration of justice; and (5) preserving evidence and obtaining just convictions (J.A. 101a).

Each of the goals thus articulated is certainly a worthy one. At the outset, however, the fundamental problem with at least the first two stems from their potentially limitless application and from their focus on concerns tangential to the central purpose of a criminal trial. The theory, for example, that the ability to give evidence at a closed trial will induce victims of criminal acts to come forward and testify is not a theory which logically limits itself to minors or even to victims of sexual crimes. Individuals who have had dealings with organized crime, individuals who are testifying against publicly popular defendants, and individuals whose own behavior was not the model of propriety all may be more willing to come forward and to testify if they can be assured of doing so behind closed doors. Nor is a desire to prevent embarrassment or humiliation a goal which logically limits itself to minors. Indeed, the very potential of cross-examination, designed as it is to expose even the good-faith falsehood, carries with it the potential for significant embarrassment. Accordingly, if goals like those articulated by the Supreme Judicial Court were permitted to serve as the foundation for a closed trial, public trials soon would become a thing of the past.

Moreover, the central concern at a criminal trial is not the comfort or mental tranquility of the testifying witnesses. To say that, even in the present context, is not to be callous or uncaring. Of course testifying at a criminal trial may be an intrusive, unpleasant and even fearsome experience. Of course efforts should be made to mitigate the unpleasant aspects of courtroom testimony.[17] But the central object of a criminal

---

[17] And they have been. Shield laws have been enacted to prohibit certain kinds of questions during cross-examination of rape victims, adult or juvenile. *E.g.*, M.G.L. ch. 233, § 21B; *see* J. Tanford & J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980). Special governmental units have been created to counsel and assist the rape victim at every stage of the proceedings. *E.g.*, M.G.L. ch. 41, § 97B. There is no reason why the same thought and care could not be given to the victim during a hearing on closure. There thus is no reason to suppose, as the Supreme Judicial Court did (J.A. 102a n.15), that a hearing on the question of closure would inevitably destroy the very things the statute seeks to preserve.

trial is the execution of the most awesome responsibility the people have reposed in their government: the responsibility to determine whether a citizen should be stripped of virtually every right this nation was founded to protect, including the right to personal liberty or even the right to life. Because of the extraordinary importance of that object, all other concerns must necessarily come second. Given the critical role played by a public trial in the just execution of that central object, the only interest truly compelling enough to warrant closure is an interest in preserving the integrity of the trial itself. *See generally, e.g., State* v. *Schmit*, 273 Minn. 78, 85, 139 N.W.2d 800 (1966) ("mere embarrassment of adult witnesses with no showing of inability to testify is not a sufficient reason to defeat . . . an overbalancing constitutional right."); *State* v. *Sheppard*, 7 Med. L. Rep. 1140, ____ A.2d ____ (Conn. 1980) (involving minor rape victims); *Lexington Herald Leader Co.* v. *Tackett*, 601 S.W.2d 905 (Ky. 1980) (involving minor sodomy victim). To the extent that the interests asserted by the Supreme Judicial Court have as their focus something else, they cannot provide a proper foundation for closing a criminal trial.

Even if one assumes for the moment that each of the interests articulated by the Supreme Judicial Court may sometimes be sufficiently compelling to warrant partial closure, the record in this case clearly demonstrates the dangers of closing a criminal trial in accordance with the statute's global sweep without making a precise and focused determination concerning whether closure is necessary to achieve a relevant interest, whether it represents the least restrictive method for doing so or whether it will be effective. Tested by those criteria, on the present record none of those interests was sufficient to warrant closure.

The first of the five interests advanced by the court was an interest in encouraging victims to come forward and testify. In that regard, the unyielding reach of the statute was characterized by the Superior Court in its Motion to Dismiss as the "major practical feature" of § 16A because it enabled the prosecutor in all cases to assure the victim "of privacy for [his

or her] testimony at trial" thus bringing him or her forward initially and ensuring his or her perseverence to the end. Motion to Dismiss at 28, 29. The "certainty of privacy" thus afforded was characterized by the Superior Court as "crucial to the victim's endurance to trial." *Id.* at 28.

But no other statute like this one exists anywhere in the country, a fact which undercuts claims about its indispensible nature. *See Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979); *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 834-35 (1978). Moreover, no nexus between closure of this trial and a desire to bring victims forward was ever shown. The victims in this case did come forward and the record contains not the slightest suggestion that they did so, in whole or in part, because of a belief that the trial would be closed to press and public. The victims persevered through trial and there is not the slightest hint that the Commonwealth at any time was in any danger whatsoever of losing their cooperation in the face of an open and public trial. On the contrary, the District Attorney, after discussing closure with the victims and purporting to act on their behalf, specifically waived whatever rights the Commonwealth might have had under § 16A to exclude the press and public (J.A. 28a).

Viewed from a broader perspective, § 16A cannot assure privacy in any meaningful sense of the term. The requirements of the Sixth Amendment and the Supreme Judicial Court's prior interpretations of § 16A, *Commonwealth* v. *Marshall*, 356 Mass. 432, 253 N.E. 2d 333 (1969); *Commonwealth* v. *Blondin*, 324 Mass. 564, 571, 87 N.E.2d 455 (1949), ensure that the victim's testimony will take place before a host of people previously unknown to him or her even if the press and public are excluded from the courtroom. Beyond that, as the Superior Court itself agrees, § 16A does not bar access to the victim's testimony from second-hand sources "such as investigative journalism, interviews outside the courtroom, and the use of subsequent transcripts of the closed testimony." Motion to Dismiss at 24. Indeed, it does

not bar access from first-hand sources such as accounts written by those whom the statute permits to attend. *See* note 7 *supra*. *See generally Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 105-06 (1979). The Supreme Judicial Court underscored the inability of the statute to achieve its perceived privacy objective when it held that the mandatory aspect of §16A is not applicable to transcripts containing a minor victim's testimony (J.A. 101a n.14) and when it observed that the victims' names were part of the public record of this very trial. (J.A. 103a). Finally, § 16A applies even if the victim has no desire for private testimony (J.A. 102a n.15). To force privacy on an unwilling recipient in supposed aid of encouraging that person to come forward and testify furthers a negligible state interest, if any at all. *See First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 794-95 (1978).

The second interest articulated by the Supreme Judicial Court in support of §16A was the protection of "minor victims of certain sex crimes" from "public degradation, humiliation, demoralization and psychological damage."[18] The court

---

[18] Noteworthy in this regard is that, while the Supreme Judicial Court has characterized the state interest just discussed as the protection of "*minor* victims of *certain sex crimes*" from "public degradation, humiliation, demoralization and psychological damage" (J.A. 101a) (emphasis added), §16A is not limited either by its terms or by any decision of the Supreme Judicial Court to only a few "sex crimes," nor is it limited to crimes involving minor victims. A multitude of misdemeanor and felony crimes, in addition to those which quickly come to mind, fall within the reach of §16A because they are literally, "crimes involving sex": polygamy (M.G.L. ch. 272, §15); lascivious cohabitation (M.G.L. ch. 272, §16); abortion (M.G.L. ch. 272, §§19-20); distribution of "matter harmful to minors" (M.G.L. ch. 272, §28); dissemination or possession of obscene matter (M.G.L. ch. 272, §29); annoying persons of the opposite sex (M.G.L. ch. 272, §53); and indecent exposure (M.G.L. ch. 272, §53). Clearly, for example, a 17-year-old recipient of material "harmful to minors" will not be subject to pressures at trial at all similar to those which might be faced by a young victim of incest. Beyond that, the statute mandates exclusion of the press and public from trials of the crimes of "getting a woman with child out of wedlock" and "the non-support of an illegitimate child." In both cases, it is quite possible, perhaps even probable, that all witnesses at the trial will be adults.

reasoned that the statute served to ease the fears of the minor victims "that the details of an attack may become public" and of the families of youthful victims that "the reporting of a sexual assault will expose a child to additional trauma. . . ." (J.A. 102a).

The record in this case, however, once again will not permit a reasoned conclusion that the victims or their families were concerned about public degradation or humiliation stemming from their public testimony at trial. Indeed, the concerns over press coverage of the trial which the victims voiced after the closure order had been entered for different reasons focused with precision only on the possible impact that knowledge of the assault might have on older relatives who did not know that the incident had taken place. *See* note 7 *supra*. And even those concerns, understandable as they are, never gave rise to a suggestion that the victims would be unwilling, to say nothing of unable, to testify at a fully public trial (J.A. 48a).

It is perhaps not surprising that the record is devoid of evidence showing that the Commonwealth's evidence was at risk because the victims feared degradation or humiliation from public testimony. Even the authorities cited by the Supreme Judicial Court do not give rise to a certain conclusion that minor victims who testify in court suffer greater psychological damage than victims who do not.[19] In fact, it appears almost

---

[19] *See* L. Brodyaga, *et al.*, *Rape and Its Victims, A Report for Citizens, Health Facilities, and Criminal Justice Agencies*, chs. 8-9 (1975) (hereinafter *LEAA Report*) (discusses results of survey of procedures for handling rape cases in metropolitan prosecutors' offices, problems faced by rape victims during the prosecution process and recommendations for changes in procedures to deal with rape cases with greater effectiveness and sensitivity to the victim); J. McDonald, *Rape: Offenders and Their Victims* 128-130 (1971) (indicates that most traumatic aspect of testimony of minor rape victim is face-to-face confrontation with accused); Burgess & Laszlo, *When the Prosecutrix is a Child: The Victim Consultant in Cases of Sexual Assault*, in *Victims and Society* (E. Viano ed. 1976) (recommends use of victim consultant to reduce emotional stress of child-prosecutrix during the legal process and to aid prosecutor in obtaining precise details of assault); Bohmer, *Judicial Attitudes Toward Rape Victims*, in *Forcible Rape* (D. Chappell *et al.* eds. 1977) (discusses survey of judicial attitudes concerning testimony of

impossible to isolate particularized causes of whatever trauma the assault and its aftermath bring to the victim.[20]

Even more speculative is the question whether the remedy prescribed by § 16A, *i.e.*, exclusion of the press and public from the courtroom, is aimed at the cause of whatever prob-

---

minor rape victims and varius means employed by judges to make victim's experience less traumatic); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne St. L. Rev. 977, 984 (1969) (hereinafter Libai) (identifies components of legal proceedings capable of putting child victim under prolonged mental stress and endangering his or her emotional equilibrium as repeated interrogations and cross-examination, facing the accused, the official atmosphere of the court, the acquittal of accused because of lack of corroborating testimony, and the conviction of accused who is a parent or relative); O'Neale, *Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Prosecution — Or How Many Times Must a Woman be Raped?* 18 Santa Clara L. Rev. 119, 145-146 (1978) (attributes in large measure the extent of trauma suffered by victim in contact with legal system to feeling that victim is herself on trial engendered by attitudes and consequent treatment of victim by law enforcement and court personnel, including lack of support and atmosphere of disbelief); Wood, *The Victim in a Forcible Rape Case: A Feminist View*, in *Rape: The First Sourcebook for Women* (N. Connell & C. Wilson eds. 1974) (points to cross-examination of victim by defense attorney as major potential cause of adverse psychological side effects). It has been suggested that, to the extent child victims who testify in court appear to have a less satisfactory recovery than those who do not, their reactions "might be related to a more seriously disturbed family background or to the seriousness of the violation that gets to court rather than the court experience itself." Peters, *The Philadelphia Rape Victim Project*, in *Forcible Rape* (D. Chappell *et al.* eds. 1977).

[20] "The vogue of ascribing the mental condition of a child victim subsequent to the sexual offense to any one particular cause is long past. To the psychiatrists, neither the child involvement in a sexual offense nor the single appearance of the child in court can be taken out of context to be diagnosed as traumatic." Libai, *supra* note 19, at 983-84, citing T. Gibbon & J. Prince, *Child Victims of Sex Offenses* 7 (1963). To the extent that "legal process trauma" is an identifiable component of general trauma experienced by a rape victim, there is little indication that it is caused by the presence of spectators in the courtroom. The presence of spectators is not one of the frequently cited evils of the judicial process, as are necessity of repeating details of the assault, cross-examination regarding prior sexual conduct, confronting the accused and unfamiliarity of the victim with the courtroom and the legal process. *See* authorities cited in note 19 *supra*.

lems the victim encounters in the courtroom experience. Both academic literature and experience suggest the likelihood that embarrassment or humiliation experienced by a victim of a sexual assault finds its source in the zealous, sometimes relentless cross-examination of the victim by the defense attorney[21] or in the face-to-face confrontation with the alleged perpetrator in the courtroom, rather than in the presence of members of the press and public.[22] Indeed, some have argued that the presence of a sympathetic public may in fact lessen the possibility of any adverse psychological effect resulting from open testimony.[23] Exclusion of the press and public from the courtroom surely cannot serve to alleviate any embarrassment which may be experienced by the victim at trial if the presence of the press and public is not its cause.

In a related vein, the Supreme Judicial Court also noted what it described as the general paternal interest a state has in preventing stigmatization of minors. As identified, that interest was served not only by § 16A, but also by a group of other statutes "designed to protect the identity of minors who are

---

[21] The prospect of being subject to cross-examination by the defense attorney is an almost universally cited source of anxiety on the part of rape victims. *See, e.g.*, Libai, *supra* note 19, at 984; Wood, *The Victim in a Forcible Rape Case: A Feminist View*, in *Rape: The First Source Book for Women* (N. Connell & C. Wilson eds. 1974) at 152-153; Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 Judicature 391, 393-94 (1975). The tradition of stringent cross-examination by defense attorneys and rape victims' consequent fear of the legal process have in fact been a major impetus in the enactment by virtually all states of rape victim shield laws. *See* J. Tanford & J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544, 550 (1980).

[22] *See* authorities cited in note 19 *supra*.

[23] Some women activist groups have advocated packing courtrooms during rape trials to lend moral support to the victim and to curb abuses by defense attorneys. *LEAA Report*, *supra* note 19, at 131-32. A type of program known as "court watching" has become a popular means of monitoring the trial of alleged rapists. Volunteers attend trials to observe the behavior of the attorneys and courtroom personnel toward the victim and whether the victim is unnecessarily abused by the trial process. They then report their findings to judges, prosecutors and the press. *Id.* at 131.

subjects of litigation" (J.A. 104a n.16). The court, pointing to a number of the Commonwealth's juvenile-delinquency statutes, stated that it would be "anomalous" if the state legislature could protect juvenile offenders by closed hearings but could not do the same for juvenile victims (J.A. 104a).

But the victims here, all young women approaching the Commonwealth's age of majority, M.G.L. ch. 4, § 7, cl. 48, gave no indication that they felt "stigmatized" by the fact that someone had assaulted them at gunpoint. *See* J.A. 48a. This was not a case involving, for example, statutory rape, M.G.L. ch. 265, §§ 22A, 23, or any other crime in which "consent" is no defense. It is extraordinarily difficult, therefore, to see why the fact of an armed assault should have given rise to any stigma at all. The victims, after all, were just that: the victims not the criminals, the targets of aggression not aggressors, the objects of the law's protection and not the subjects of its prosecutorial might.

Beyond that, the fact that § 16A is aimed at minors just is not sufficient, in and of itself, to make it valid for, even where minors are concerned, paternalistic and benevolent state designs do not sweep from their paths all else, *e.g.*, *Davis* v. *Alaska*, 415 U.S. 308, 319-20 (1974); *In re Winship*, 397 U.S. 358, 365-66 (1970); *Butler* v. *Michigan*, 352 U.S. 380, 383-84 (1957), particularly when less burdensome means for achieving the same result undoubtedly exist. *See*, *e.g.*, *Doe* v. *Stegall*, 653 F.2d 180 (5th Cir. 1981). Moreover, the "stigma" which a juvenile criminal may suffer as a result of state action is not analogous at all to any "stigma" a victim may suffer as a result of the criminal activity of some person acting beyond the state's control. In the first case, stigma attaches because of state action which brands a juvenile with the potentially indelible mark of criminality. In the second case, state action in the form of a criminal trial serves to remove whatever stigma might otherwise exist. By seeking to prove beyond a reasonable doubt that the defendant was guilty of criminal behavior, the state seeks simultaneously to show that the vic-

tim was the innocent target of unlawful aggression. The state interest in conducting that purifying process in secret is much to be doubted. *Richmond Newspapers*, 448 U.S. at 571-72.

The third interest identified by the Supreme Judicial Court was described as enhancement of the likelihood of credible testimony from minors, free of confusion, fright or embellishment. While not elaborated upon in *Globe II*, the fear expressed by the Supreme Judicial Court in *Globe I* was that the minor victim of a sexual assault is likely to be either confused or frightened by the presence of many persons in the courtroom or, alternatively, impressed with the unusual opportunity for enthralling a large audience with his or her stories (J.A. 73a).

But, once again, the nexus between that generalized interest and this case is not clear at all. As stated, the victims in this case were young women, all at the brink of full majority. By their own statements they were not cowed by the potential presence of the press, and to conclude from their age alone that they were likely to use the trial as a forum from which to enthrall an audience with tall tales is simply unwarranted. Beyond that, inhibitions caused by a large audience always can be handled on a case-by-case basis in a host of different ways. Tall tales by whomever told have been guarded against for centuries by cross-examination, the sanctions attendant on perjury and fundamental notions of competence, *see, e.g.*, *Pocatello* v. *United States*, 394 F.2d 115 (9th Cir. 1968). There is nothing in the present record to suggest that those less burdensome solutions would have been inadequate to handle inhibitions or prevarications had they arisen here.

Much of what has been said about the first three interests applies, with even greater force, to the fourth and fifth interests the Supreme Judicial Court described. The fourth interest, *i.e.*, promotion of "the sound and orderly administration of justice", appears to be, at least in this context, the kind of interest which the court itself said was insufficient to override First-Amendment freedoms. *Compare* J.A. 99a, *with*

Commonwealth v. *Blondin*, 324 Mass. 564, 571, 87 N.E.2d 455 (1949), *cert. denied*, 339 U.S. 984 (1950). Moreover, the court voiced that interest without any explanation concerning how uniform and mandatory exclusion of the press and public from trials in fact promotes it or how it was promoted by closure here. The thrust of this Court's opinions in *Richmond Newspapers* and *Gannett* would lead to precisely the opposite conclusion, *i.e.*, that the sound and orderly administration of justice is furthered by the "presumption of openness [which] inheres in the very nature of a criminal trial under our system of justice." *Richmond Newspapers*, 448 U.S. at 573. A mandatory rule based on a contrary presumption certainly cannot withstand constitutional analysis.

The fifth and final interest identified in *Globe II*, an interest in "preserving evidence and obtaining just convictions," is likewise an interest which the court did not relate to the order entered here and which, on the record, closure was wholly unnecessary to serve. Moreover, that interest and § 16A appear to be at odds, one with the other. This Court emphasized in *Richmond Newspapers* the historical importance of openness in assuring "that the proceedings were conducted fairly to all concerned, and [in discouraging] perjury, the misconduct of participants, and decisions based on secret bias or partiality." *Richmond Newspapers*, 448 U.S. at 569. *See also In re Oliver*, 333 U.S. 257, 266-70 (1948). That being the case, it is apparent that mandatory closure must inevitably damage the integrity of the judicial process and thus the justice in which that process results. *See generally Richmond Newspapers*, 448 U.S. at 569-73. To posit a "just" conviction following a secret trial is, in sum, to posit a contradiction in terms.

In summary, several of the interests identified in *Globe II* are not the kinds of interests which may justify exclusion of the press and public from testimony of minor victims during trials covered by § 16A. And even if those interests may sometimes justify partial closure, the record is devoid of any facts showing a clear and direct nexus, or any nexus at all, between those

interests and closure here or showing that some other method would not have worked or even showing that closure would. In the words of this Court in *Richmond Newspapers*, "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at trial would lose much meaning if access to observe trials could, as it was here, be foreclosed arbitrarily." *Richmond Newspapers*, 448 U.S. at 576-77.

II. Massachusetts General Laws ch. 278, § 16A as Construed by the Supreme Judicial Court and as Applied in This Case Violates the Sixth Amendment to the Constitution of the United States as Applied to the States Through the Fourteenth Amendment.

In addition to the First-Amendment principles just canvassed, the Sixth Amendment, which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial," also conferred on the *Globe* a right to attend the entire trial of Albert Aladjem, a right that both § 16A and the closure order violated. The Supreme Judicial Court declined to address the *Globe's* Sixth-Amendment claims, claims the court considered personal to Mr. Aladjem. The mere fact that Mr. Aladjem, acquitted below, is not actually before this Court should not, however, end the Sixth-Amendment inquiry.

A. *Appellant Has Standing to Invoke the Public Trial Guarantee of the Sixth Amendment.*

As a member of the public excluded from the criminal trial of Albert Aladjem, the *Globe* satisfies both the constitutional and prudential requirements of standing to invoke the Sixth Amendment's guarantee of a public trial. The *Globe's* expulsion from the courtroom under the closure order entered pursuant to § 16A clearly constituted the "injury in fact"

necessary to meet the "case or controversy" requirement of Article III jurisdiction. *Singleton* v. *Wulff*, 428 U.S. 106, 112 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152-53 (1970); *Baker* v. *Carr*, 369 U.S. 186, 204-08 (1962). As a prudential matter, the *Globe* is also a proper proponent of the legal right it asserts, for its interest in attending the criminal trial of Albert Aladjem is "arguably within the zone of interests to be protected" by the Sixth Amendment. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). *See Singleton* v. *Wulff*, 428 U.S. 106, 112 (1976).

There is little that can be said about the interests protected by the Sixth Amendment which was not said in one or more of the opinions in *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979). The appropriate question, therefore, concerns the impact of that decision on this case. At the outset, the Sixth-Amendment issue before this Court in *Gannett* concerned pretrial hearings alone. In this Court's words:

> There is no question that the Sixth Amendment permits and even presumes open trials as a norm. But the issue here is whether the Constitution *requires* that a pretrial proceeding such as this one be opened to the public, even though the participants in the litigation agree that it should be closed to protect the defendants' right to a fair trial.

Id. at 385 (emphasis in original).

That the issue before this Court in *Gannett* concerned pretrial proceedings and not the trial itself was further discussed in *Richmond Newspapers*:

> In *Gannett Co.* v. *DePasquale*, *supra*, the Court was not required to decide whether a right of access to *trials*, as distinguished from hearings on *pre*trial motions, was con-

> stitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a *pre*trial suppression hearing. . . .

Richmond Newspapers, 448 U.S. at 564 (emphases in original).

While the opinion surely is subject to a broader reading, the narrow holding of *Gannett* thus appears to be that the press and public may not raise the Sixth Amendment as a constitutional bar to an order closing a pretrial hearing where an open hearing poses a "reasonable probability of prejudice" to a defendant's right to a fair trial and where all participants in the hearing agree on closure. *Gannett*, 443 U.S. at 393-94.[24] To state this Court's apparent holding in *Gannett*, then, is to distinguish it at once from the present case, for here we are dealing with a trial, not with a pretrial proceeding. Here the prosecutor did not request closure, and here the defendant specifically objected to the closure order.

So viewed, the Sixth Amendment holding in *Gannett* is consistent with the history and fundamental policies which give

---

[24] *Gannett* does not, of course, foreclose the possibility that the First Amendment provides the public a right of access to pretrial proceedings. Indeed, Justice Powell specifically stated that he would so hold. *Gannett*, 443 U.S. at 397 (Powell, J., concurring). Furthermore, Justice Blackmun's view that the Sixth Amendment's public-trial provision encompasses pretrial proceedings, *id.* at 436-37, when considered in conjunction with his concurrence in the *Richmond Newspapers* judgment, suggests that he too would recognize, albeit as a "secondary position," a First-Amendment right of access to pretrial proceedings. *Richmond Newspapers*, 448 U.S. at 603-04 (Blackmun, J., concurring). Finally, the Court's opinion in *Gannett* (representing the views of five Justices) considered and expressly reserved the question since ". . . even assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations . . . this putative right was given all appropriate deference by the state *nisi prius* court in the present case." *Id.* at 392. In light of *Richmond Newspapers* (although public access to pretrial proceedings was not there at issue), this Court's eventual recognition of some right to attend pretrial proceedings under the First Amendment seems all the more likely.

rise to a Sixth-Amendment guarantee of a public trial itself. While the Anglo-American legal system reflects an "unbroken, uncontradicted history" of open criminal trials, *Richmond Newspapers*, 448 U.S. at 573; *Gannett*, 443 U.S. at 414 (Blackmun, J., concurring in part and dissenting in part), the same cannot be said, at least with the same strength, of pretrial proceedings. *Id.* at 387-90. Moreover, the power of the judiciary to limit access to pretrial proceedings under certain circumstances results directly from the function of the pretrial proceeding as a safeguard for the fair administration of justice at the trial proper. As this Court phrased it in *Gannett*, "pretrial proceedings, *precisely because of the . w . concern for a fair trial*, were never characterized by the same degree of openness as were actual trials." *Id.* at 387-88 (emphasis added).

As a result, closure may be allowed under the particular circumstances of a particular pretrial evidentiary hearing chiefly because the question at hand is whether certain information can be shared with the jury consistent with the constitutional parameters of a fair trial and because the numerous, less drastic protective measures which exist to guard against juror prejudice at trial will be unavailing if a negative answer to that question is reached. In short, the holding in *Gannett* does not compel the conclusion that the public is without an enforcible Sixth-Amendment right to attend criminal trials. Rather, the historic and functional distinctions between pretrial proceedings and trials proper militate in favor of this Court's recognition of the public's Sixth-Amendment right to attend the trial of criminal cases.

Beyond that, the unbroken history behind and the important purposes to be served by recognizing standing on the part of members of the public to raise the Sixth-Amendment public trial right are exhaustively canvassed in Justice Blackmun's opinion in *Gannett*, 443 U.S. at 406-48 (Blackmun, J., concurring in part and dissenting in part). Perhaps most fundamental is "the tradition of our system of criminal justice that a trial is a 'public event' and that '[w]hat transpires in the court

room is public property.'" *Id.* at 412, quoting *Craig* v. *Harney*, 331 U.S. 367, 374 (1947). For beyond protecting the fair trial rights of the accused, public trials give life to "our larger concern that our judicial system preserve the 'appearance of justice' by revealing for all to evaluate the testimonial and evidential bases upon which judicial determinations are founded." *United States* v. *Cianfrani*, 573 F.2d 835, 853 (3rd Cir. 1978). *See Levine* v. *United States*, 362 U.S. 610, 616 (1960); *Offutt* v. *United States*, 348 U.S. 11, 14 (1954).

Equally significant, public trials serve as a vital check on the possible abuse of judicial power. *Gannett*, 443 U.S. at 412 (Blackmun, J., concurring in part and dissenting in part). *See Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring); *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966); *In re Oliver*, 333 U.S. 257, 268-71 (1948). Accordingly, the public trial has long been regarded as an indispensable "safeguard against any attempt to employ our courts as an instrument of persecution," or "for the suppression of political and religious heresies." *Id.* at 270. In the same vein is the notion that public trials safeguard the fair administration of justice by discouraging perjury and encouraging witnesses to come forward and testify. *See Richmond Newspapers*, 448 U.S. at 569; *United States* v. *Cianfrani*, 573 F.2d 835, 852-53 (3rd Cir. 1978).

Of overriding importance, too, are the educational and participatory functions served by ensuring public access to criminal trials. The trial is a social drama which allows the public to observe, first-hand, the workings of its judicial system and to benefit from the prophylactic and cathartic results thereby engendered. *Richmond Newspapers*, 448 U.S. at 571. The public trial also provides the public with knowledge about the operation of its judicial system — knowledge which is "of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 495 (1975). *See Richmond Newspapers*, 448 U.S. at 572; *Gan-*

nett, 443 U.S. at 412-13 (Blackmun, J., concurring in part and dissenting in part); *Sheppard* v. *Maxwell*, 384 U.S. 333, 350 (1966).

To articulate the functions and purposes of the public trial of criminal cases is to understand why neither the accused nor the other parties to the proceeding can adequately protect the public's interests in attending. The interests of the public and the accused who desires a secret trial in any particular criminal case do not necessarily coincide. *United States* v. *Cianfrani*, 573 F.2d 835, 853 (3rd Cir. 1978). *See* 1 J. Bentham, *The Rationale of Judicial Evidence* 576 (1827).[25] Nor do the interests of the prosecutor or the judge necessarily coincide with those of the public. *See Gannett*, 443 U.S. at 428 (Blackmun, J., concurring in part and dissenting in part); *United States* v. *Cianfrani*, 573 F.2d 835, 853 (3rd Cir. 1978). Beyond that, certain public interests, *i.e.*, deterrence of perjury, encouraging unknown witnesses to come forward, community catharsis and confidence in the regularity of judicial proceedings, simply cannot be satisfied in the absence of a public trial. Surely, they cannot be satisfied by a statute like § 16A which routinely bars *every* party to the litigation — defendant, prosecutor and trial judge alike — from asserting *any* interest in an open courtroom, be it his own, the victim's or the public's, during the entire testimony of the chief prosecution witness.

The Sixth Amendment's literal reservation of its guarantees to "the accused" is no bar to recognition of an independent right on the part of the press and public to enforce those guar-

---

[25] In fact, history renders it "doubtful that the tradition of publicity ever was associated with rights of the accused," for the practice, "was established as a feature of English justice long before the defendant was afforded even the most rudimentary rights." *Gannett*, 443 U.S. at 421 (Blackmun, J., concurring in part and dissenting in part). Rather, the public-trial tradition came about as an "inescapable concomitant of trial by jury," and according to both Hale and Blackstone was a function not of individual liberty but of the "effectiveness of the trial process." *Id.* at 419, 421. *See United States* v. *Cianfrani*, 573 F.2d 835, 853 n.6 (3rd Cir. 1978); Radin, *The Right to a Public Trial*, 6 Temp. L.Q. 381, 384 (1931).

antees. Indeed, to determine the scope of the Sixth Amendment through use of the canon *espressio unius est exclusio alterius* would be to ignore the mandate of the Ninth Amendment that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and would give life to the fear of that Amendment's author, James Madison, that the Bill of Rights might be used as a sword with which to slay fundamental rights rather than as a shield with which to defend them. *See generally Richmond Newspapers*, 448 U.S. at 579; *Griswold* v. *Connecticut*, 381 U.S. 479, 489-92 (1965); The Federalist No. 84 (A. Hamilton) at 575-78 (Heritage ed. 1945); Note, *The First and Ninth Amendment Theory of a Right of Access to Criminal Trials*, 2 W.N. Eng. L. Rev. 723, 742 (1980); B. Patterson, *The Forgotten Ninth Amendment* 13 (1955).

B. *Appellant Has Standing to Invoke the Public Trial Guarantee of the Defendant Who Opposed Closure.*

Even if this Court were to decide that the *Globe* does not have standing to invoke a Sixth-Amendment public right of access to criminal proceedings generally, it should nevertheless permit the *Globe* to raise the Sixth-Amendment public-trial right of Albert Aladjem, the defendant in the case at hand. Whatever might be said of a "stranger's" standing to assert a Sixth-Amendment right to a public trial when the criminal defendant abjures that Amendment's protections, it seems clear that standing should exist when the defendant himself seeks to assert at a trial the rights the Amendment provides. This case presents such a situation, for at the trial below Mr. Aladjem specifically objected to the closure order entered (J.A. 18a).

As a general rule, of course, "one may not claim standing . . . to vindicate the constitutional rights of some third party." *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953). However, this Court has recognized that where the prudential considerations underlying that general rule are absent, its limitations should

not apply. *Craig* v. *Boren*, 429 U.S. 190, 193-94 (1976); *Singleton* v. *Wulff*, 428 U.S. 106, 114 (1976); *Barrows* v. *Jackson*, 346 U.S. 249, 259 (1953). In determining whether those prudential considerations preclude standing in a particular case, this Court has looked primarily to two factual elements. First, it has considered the "relationship of the litigant to the person whose right he seeks to assert." *Singleton* v. *Wulff*, 428 U.S. at 114. If "the enjoyment of [a] right [by the third party] is inextricably bound up with the activity the litigant wishes to pursue," the Court can be sure that it is not engaged in an unnecessary construction of a constitutional provision and, further, that the litigant "is fully, or very nearly, as effective a proponent of the right as the [third party]." *Id.* at 114-15. *See also Carey* v. *Population Services International*, 431 U.S. 678, 684 (1977) (parties are permitted "to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function"). *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965). *Cf. FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1920) (broadcaster afforded standing to vindicate the interest of the "public" in compliance with the federal Communications Act).

Clearly the *Globe's* interests were "inextricably bound up" with Mr. Aladjem's interest in having his trial open to the public. Indeed, in that regard, the *Globe's* interests and those of Mr. Aladjem are but two sides of the same coin. Moreover, where, as here, both the *Globe* and Mr. Aladjem opposed closure of the trial, there is little question that the *Globe* is as effective a proponent of the Sixth-Amendment public-trial right as Mr. Aladjem would be. Here, for example, there is no possibility that the Court will adjudicate a right that a third party may not wish to assert, *see Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80 (1978), and the absolute nature of the public-trial guarantee dispels any notion that the "applicable constitutional question [is] ill-defined and speculative." *Craig* v. *Boren*, 429 U.S. 190, 193 (1976).

The second factual element to which this Court has looked in determining the propriety of third-party standing is whether there exists some "genuine obstacle" to the third party's ability to assert his own rights. *Singleton* v. *Wulff*, 428 U.S. 106, 115-16 (1976). The genuine obstacles in the path of a defendant's assertion of his own Sixth-Amendment claims in the face of a closure order are both legal and practical. As a matter of law, at least in Massachusetts, it is not clear that a defendant faced with a closure order has any appellate avenues to pursue until the trial has ended. *See Morrissette* v. *Commonwealth*, Mass. Adv. Sh. (1980) 765, 402 N.E.2d 492. As a practical matter, the typical defendant on the eve of a trial for his life or liberty is unlikely to have the time, energy or resources to contest immediately the propriety of that order through the appellate courts. Moreover, imminent mootness has been recognized as the kind of genuine obstacle which permits a litigant, other qualifications satisfied, to raise the claims of another. *Singleton* v. *Wulff*, 428 U.S. 106, 117 (1976). Because a criminal trial always may end in acquittal, the criminal defendant's public-trial claim faces imminent mootness each time a closure order is entered. If an acquittal results, the defendant cannot be retried for the same offense, and any assertion that he might be faced with a closure order in a future trial for a future alleged commission of a similar crime would be wholly speculative. *Cf. Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).[28]

---

[28] There was no majority opinion in *Singleton*. The opinion discussed throughout the section of this brief just concluded was Justice Blackmun's opinion for a plurality. Yet recognition of standing on the part of the *Globe* to assert Mr. Alvidjem's rights here would seem to satisfy the criteria specified by those who dissented from the judgment in *Singleton*, for § 16A "directly interdicts" the "normal functioning" of the relationship between a defendant who desires a public trial and members of the public who desire to attend. *Singleton* v. *Wulff*, 428 U.S. 106, 128 (1976) (Powell, J., concurring in part & dissenting in part).

C. *As Construed by the Supreme Judicial Court to Require Closure of a Criminal Trial During the Testimony of a Minor Victim, M.G.L. ch. 278, § 16A Violates the Sixth Amendment.*

Turning to the merits, there can be no doubt that the right to a public trial is firmly engrained in our notions of ordered liberty. Indeed, it stands among very few of the absolutes contained in the Bill of Rights as to which this Court, despite the passage of nearly 200 years, has not squarely announced an exception. During that period, this Court has firmly rejected the notion that state legislatures have the ultimate power to determine when the guarantees contained in the Sixth Amendment apply and when they do not. *Groppi* v. *Wisconsin*, 400 U.S. 505, 511 (1971).

Moreover, the Sixth-Amendment right here asserted — the right to attend the trial of a criminal case — cannot conceivably be viewed as a right somewhat removed from the core of the rights that Amendment preserves. *Cf. Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring); Brennan, *Address*, 32 Rutgers L. Rev. 173, 176 (1979). The right of attendance is the very right itself. Without the right to attend, nothing, quite simply, is left of that portion of the Amendment which speaks of public trials. *Cf. Branzburg* v. *Hayes*, 408 U.S. 665, 681 (1972).

Given those facts and given the critical role in the pursuit of justice played by a public trial, the Sixth Amendment must be read to require that a criminal trial may not be closed, in whole or in part, unless closure is inescapably necessary to safeguard a state interest of the highest conceivable order, unless there are no less drastic methods available for pursuing that interest and unless it is clearly demonstrated that the closure order will effectively guard against the danger perceived. *See Gannett*, 443 U.S. at 441-45 (1979) (Blackmun, J., concurring in part and dissenting in part). *See generally Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979);

Oklahoma Publishing Co. v. *District Court*, 430 U.S. 308, 311 (1977); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 565-67 (1976).

Section 16A in general and as applied in this case meets none of those criteria. As has been amply demonstrated above, the state interests served by the statute are both speculative and vaguely defined. The statute in its mandatory aspect takes no account of the desires of the individual it is supposed to protect, countenances no suggestion that protection may be afforded through more moderate means, and permits no evaluation of the harm from which protection is sought. Finally, as an effective refuge from conceivable harm, the statute is seriously deficient. In sum, when measured against a Sixth-Amendment right to a public trial, § 16A and closure orders like the one here entered simply must give way.

CONCLUSION.

This case illustrates the problem which exists whenever broad and unwaivering legislative judgments seek to foreclose exercise of rights preserved by the First and Sixth Amendments to the Constitution of the United States. There simply is nothing in the record now before this Court which could lead to a reasoned conclusion that a danger to the just progress of the trial of Albert Aladjem, or even to interests possessed by the testifying victims, would have been presented by attendance of the press and public at that trial. If, in the future, the statute operates in the manner mandated by the Supreme Judicial Court, there never will be a record capable of giving rise to a reasoned conclusion that such dangers exist. However well-motivated the statute's design and however well-motivated the Supreme Judicial Court's construction of that statute, the net result is a prophylactic foreclosure of rights guaranteed by the First and Sixth Amendments, a foreclosure which may well be wholly unnecessary to advance any significant state interest in

any given case and which was unnecessary to advance those interests here. A unifying theme running firmly through every one of the decisions this Court has rendered with respect to the First Amendment is that needless foreclosure of the rights that Amendment preserves is absolutely intolerable. It should be no less intolerable under the Sixth Amendment. Under the First Amendment or under the Sixth Amendment or under both, automatic closure of parts of criminal trials mandated by M.G.L. ch. 278, § 16A and effected by that statute in this case are impermissible. The contrary judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts should be reversed.

Respectfully submitted,

JAMES F. McHUGH
MARC A. REARDON
JANE E. SERENE
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300
Counsel for Appellant

Appellee's Brief

Office - Supreme Court, U.S.
FILED
FEB 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-611.

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Appellee.

FRANCIS X. BELLOTTI,
Attorney General,
MITCHELL J. SIKORA, JR.,
GERALD J. CARUSO,
ALAN B. SHERR,
Assistant Attorneys General,
2019 McCormack Building,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1038
Counsel for the Appellee

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Whether, in the course of criminal trials of sexual assault upon minors, Massachusetts' mandatory closure of the testimony of the juvenile victim violates the press's right of attendance under the First or Sixth Amendments of the Constitution.

Table of Contents.

Statement of the case 1

Summary of the argument 3

Argument 5

I. The operation of the Massachusetts Closure Statute differs from the circumstances of the Richmond Newspaper case 5

II. The newspaper's Sixth Amendment contention lacks merit: the Globe does not have standing to pursue the theory, and in substance the Closure Statute does not violate a putative Sixth Amendment right of trial access 8

III. The Massachusetts Closure Law satisfies the press's First Amendment right of access to criminal trials 13

A. In English and American practice, the testimony of juvenile victims of sexual offenses has not been a portion of criminal trials traditionally or consistently open to the public and therefore should not be absorbed automatically into a First Amendment right of press attendance 13

1. The English tradition 14

2. The American tradition 19

B. The closure of a juvenile victim's testimony serves overriding state purposes: it protects the child from the additional trauma of public testimony, sustains her cooperation through the prosecutorial process, and enables just convictions in a pernicious and often undetectable genus of crime 22

C. The Closure Statute serves the identified state interests effectively; it does not overbroadly or unnecessarily restrict trial publicity 29

1. The statute effectively promotes its purposes 29

2. The statute does not work overbroadly; it could not serve its purposes equally well as a discretionary policy 36

D. The Closure Statute does not restrict the flow of information necessary to the operation of democratic institutions 43

Conclusion 47

Table of Authorities Cited.

Cases.

Barrows v. Jackson, 346 U.S. 249 (1953) 11n

Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944) 20n

Benedict v. People, 23 Colo. 126 (1896) 20n

Berger v. United States, 295 U.S. 78 (1935) 39n

Bivins v. State, 313 So.2d 471 (Fla. App. 1972) 20n

Blaisdell v. Commonwealth, 372 Mass. 753, 364 N.E.2d 191 (1977) 11n

Broadrick v. Oklahoma, 413 U.S. 601 (1973) 7n, 42n

Butler v. Smith, 416 F.Supp. 1151 (S.D.N.Y. 1976) 12n

Carey v. Population Services International, 431 U.S. 678 (1977) 11n

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 7n, 42

Coker v. Georgia, 433 U.S. 584 (1977) 24

Commonwealth v. Stevens, 237 Pa. Super. 457 (1975) 21n

Connecticut v. Frazier, 7 Med. L. Rep. 1854, _____ Conn. _____ (1981) 47n

Connecticut v. McCloud, 6 Med. L. Rep. 1613 (Conn. Super. Ct. 1981) 47n

Connecticut v. Sheppard, 7 Med. L. Rev. 1140, _____ Conn. _____ (1981) 47n

Corey v. Commonwealth, 364 Mass. 137, 301 N.E.2d 450 (1973) 11n

Cox v. New Hampshire, 312 U.S. 569 (1941) 7n, 42

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 41

Davis v. Alaska, 415 U.S. 308 (1974) 46

Eisenstadt v. Baird, 405 U.S. 438 (1972) 11n

Gannett Co. v. DePasquale, 443 U.S. 368 (1979) 5, 6, 7n, 8, 9n et seq.

Ginsberg v. New York, 390 U.S. 631 (1968) 39

Globe Newspaper Co. v. Superior Court, Mass. Adv. Sh. 1493, 423 N.E.2d 773 (1981) 6, 7n, 8, 37, 42n et seq.

Globe Newspaper Co. v. Superior Court, Mass. Adv. Sh. 485, 401 N.E.2d 360 (1980) 5, 6, 7n, 8, 11n et seq.

Grant v. Readers Digest, 151 F.2d 733 (2d Cir. 1945) 34n

Griswold v. Connecticut, 381 U.S. 479 (1965) 11n

Harris v. Stephens, 361 F.2d 888 (8th Cir. 1966), cert. denied sub nom. Harris v. Bishop, 386 U.S. 964 (1967) 20n

Hogan v. State, 191 Ark. 437 (1935) 20n

In re Gault, 387 U.S. 1 (1967) 46

Kovacs v. Cooper, 336 U.S. 77 (1949) 42

LaTaille v. District Court of Eastern Hampden, 366 Mass. 525, 320 N.E.2d 877 (1974) 11n

Lexington Herald Leader v. Tackett, 6 Med. L. Rep. 1436, _____ S.E.2d _____ (Ky. 1980) 47n

Linda R.S. v. Richard D., 410 U.S. 614 (1973) 39n

McKeiver v. Pennsylvania, 403 U.S. 545 (1971) 41, 46

Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976) 18n, 31

North Carolina v. Burney, 7 Med. L. Rep. 1411, _____ N.C. _____ (1981) 47n

New York v. Jones, 7 Med. L. Rep. 2096 (N.Y. Sup. Ct. App. Div. 1981) 47n

Oklahoma Publishing Co. v. District Court of Oklahoma County, 430 U.S. 308 (1977) 18n, 31

Peck v. Chicago Tribune, 214 U.S. 185 (1909) 34n

People v. Swafford, 65 Cal. 223 (1884) 20n

Price v. State, 496 S.W.2d 103 (Tex. Crim. App. 1973) 21n

Prince v. Massachusetts, 321 U.S. 158 (1944) 40

Re Clement, [1822] 147 E.R. 404 18

Re De Beaujue, [1949] 1 All E.R. 439 18

Re F (a minor), [1976] 3 All E.R. 274 16, 17

Re R (MJ) (an infant), [1975] 2 All E.R. 439 18

Re R (MJ) (an infant), [1975] 2 All E.R. 749 16

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) passim

Scott v. Scott, [1913] A.C. 417, [1911-1913] 1 All E.R. Rep. 1 15, 16, 17

Singleton v. Wulff, 428 U.S. 106 (1976) 11n

Smith v. Daily Publishing Co., 443 U.S. 97 (1979) 31, 46

Stamicarban, N.V. v. American Cyanamid Co., 506 F.2d 532 (2d Cir. 1974) 21

State v. Callahan, 100 Minn. 63 (1907) 20n

State v. Gionfriddo, 154 Conn. 90 (1966) 20n

State v. Padilla, 91 N.M. 800 (1978) 21n

State v. Purvis, 157 Conn. 198 (1968), cert. denied, 395 U.S. 928 (1969) 20n
State v. Santos, _____ R.I. _____, 413 A.2d 58 (1980) 21n
State v. Sinclair, 274 S.E.2d 411 (S.C. 1981) 47n
State v. Smith, 123 Ariz. 243 (1979) 20n
Tanksley v. United States, 145 F.2d 58 (9th Cir. 1944) 11n
United States v. Eisner, 533 F.2d 987 (5th Cir.), cert. denied, 429 U.S. 919 (1976) 11n
United States v. Giese, 158 F.Supp. 821 (D. Alaska), aff'd, 262 F.2d 151 (9th Cir. 1958), cert. denied, 361 U.S. 842 (1959) 20n
United States v. Hernandez, 608 F.2d 741 (9th Cir. 1979) 11n
United States v. Kobli, 172 F.2d 919 (3d Cir. 1949) 11n
United States ex rel. Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977) 20n
United States ex rel. Smallwood v. LaValle, 377 F. Supp. 1148 (E.D.N.Y. 1974) 12n

CONSTITUTIONS.

United States Constitution, Amendment I passim
Amendment VI passim
Amendment XIV 48
Alabama Constitution, 1901, art. VI, § 169 19n
Mississippi Constitution art. 3, § 26 (1972) 19n

STATUTES.

Federal Rules of Evidence 412 43n
Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (1978) 43n

Supreme Court Rule 34.2 1
Alabama Code § 12-21-20 (1979) 19n
Arizona Revised Statutes Annotated § 12-2312 20n, 43n
Rules of Civil Procedure 9.3 (1973) 19n
Colorado Rules of Civil Procedure 42(c) (1973) 19n
Delaware Code Annotated 1981 Replacement Volume § 1516 (a) 19n
Florida Statutes Annotated § 918.16 (West. Supp. 1980) 19n
§ 918.7 20n, 43n
Georgia Code § 81-1006 (1956 Rev.) 19n
Idaho Rules of Civil Procedure 77(b) (1978 Supp.) 19n
Illinois Statutes Annotated c. 70, § 76 (Smith-Hurd) 19n
Iowa Code § 675.20 (1971) 19n, 37n
Massachusetts General Laws c. 211, § 3 10n
c. 278, § 16A 8, 12n, 36, 37n
§ 16C 41n
Michigan Compiled Laws § 766.9 (1968) 19n
Montana Revised Codes Annotated § 3-1-313 (1979) 19n
§ 46-15-401 20n, 43n
New Mexico Statutes Annotated § 30-9-17 20n, 43n
New York Judiciary Law § 4 (McKinney 1968) 19n
North Carolina General Statutes § 15-166 (1976) 20n
North Dakota Century Code § 27-01-02 (1981 Supp.) 20n
New Hampshire Revised Statutes Annotated § 632-A:8 (1979) 20n
South Carolina Code § 16-3-660 (1976) 20n
Utah Code Annotated § 78-7-4 (1953) 20n
Virginia Code § 18.2-67 (1965) 20n
Vermont Statutes Annotated Tit. 12, § 1901 (1973) 20n

West Virginia Code § 48-2-23 (1966) 20n, 37n
Wisconsin Statutes § 970.03(4) (1977) 20n
Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, §§ 11-12 18
Children Act, 1908, 8 Edw. 7, c. 67, § 114 17
Children and Young Persons Act, 1933, 23 Geo. 5, c. 12, §§ 37, 39 17
Punishment of Incest Act, 1908, 8 Edw. 7, c. 45, § 5 17
Scottish Act of June 12, 1963 17

MISCELLANEOUS.

Berger, Man's Trial, Women's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1 (1977) 26n, 27n, 31n, 35n
3 Blackstone, Commentaries (21st ed. 1844) 14n
4 Commentaries 15
Bode, Fighting Back, c. 7 (1978) 23n, 25
Bohmer, Judicial Attitudes Toward Rape Victims, in Forcible Rape (D. Chappell, R. Geis & G. Geis eds. 1977) 23n, 24n
Bohmer & Blumberg, Twice Traumatized: The Rape Victim and the Court, 58 Judicature 391 (1975) 23n, 25n, 26n, 31n, 35n
Brodyaga, Gates, Singer, Tucker & White, Rape and Its Victims, A Report for Citizens, Health Facilities, and Criminal Justice Agencies, cc. 8-9 (1975) 23n, 25n
Burgess & Lazlo, When the Prosecutrix is a Child: The Victim Consultant in Cases of Sexual Assault, in Victims and Society (E. Viano ed. 1976) 24n

2 Coke, Institutes of the Laws of England (7th ed. 1817) 14, 15

Davis, Rights of Juveniles (2d ed. 1981) 46n

Eldefonso, Law Enforcement and the Youthful Offender 166 (3d ed. 1978) 46n

Geis, Publicity and Juvenile Court Proceedings, 30 Rocky Mt. L. Rev. 101 (1958) 46n

Hale, The History of the Common Law of England (6th ed. 1820) 14n

1 Harper and James, The Law of Torts § 5.1 (1956) 34n

Hilberman, The Rape Victim, cc. 2, 7-8 (1976) 23n, 27n

Holmstrom & Burgess, The Victims of Rape: Institutional Reactions 229 (1975) 23n, 24n, 25n, 26n, 27n

Jenks, The Book of English Law (1st ed. 1928) 15

Katz and Mazur, Understanding the Rape Victim (1979) 23n, 27n

Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne L. Rev. 977 (1969) 24n, 27n

MacDonald, Rape Offenders and Their Victims (1971) 23n, 27n, 28n

Morosco, The Prosecution and Defense of Sex Crimes § 103[b] (1978) 23n, 25n, 26n

§ 4.02(4) 44

§ 4.02(5) 44

§ 4.02(c) 26n

§ 403 10n, 23n

§ 403[1] 46n

Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 V. Pa. L. Rev. 1 (1961) 22n

O'Neale, Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution — Or How Many Times Must a Woman Be Raped, 18 Santa Clara L. Rev. 119 (1978) 24n

Parker, The Rights of Child Witnesses: Is the Court a Protector or Perpetrator? 17 New England L. Rev. No. 3 (1982) 43

Pollack & Maitland, 2 The History of English Law (2d ed. 1899) 14

President's Commission on Law Enforcement and Administration in Justice, The Challenge of Crime in a Free Society 21-22 (1967) 28, 37n

Recent Statutory Developments in the Definition of Forcible Rape, 61 Va. L. Rev. 1500 (1975) 26n, 27n

Restatement of the Law of Torts Second § 559, Comment e (1977) 34n

Sutherland & Scherl, Crisis Intervention with Victims of Rape, in Forcible Rape (D. Chappell, R. Geis & G. Geis eds. 1977) 24n, 25n

Tanford & Bocchino, Rape Victims, Shield Laws, and the Sixth Amendment, 128 W. Pa. L. Rev. 544 (1980) 26n, 43n

United States Department of Justice, Federal Bureau of Investigation, Crime in the United States (Annual Report released September 24, 1980) 28, 37n

The Victim in a Forcible Rape Case: A Feminist View, 11 Am. Crim. L. Rev. 335 (1973) 24n

1 Wharton's Criminal Law § 75 (14th ed. 1978, C.E. Torica) 39n

6 Wigmore Evidence § 1834 (Chadbourn rev. 1976) 22

§ 1835 19, 22

No. 81-611.

In the
Supreme Court of the United States.

OCTOBER TERM, 1981.

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS.

Brief of the Appellee.

Statement of the Case.

In accordance with Supreme Court Rule 34.2, the Appellee Superior Court (the Commonwealth) submits the following supplemental statement of certain facts.[1]

---

[1] Consistently with the Appellant Globe Newspaper Company (the Globe or the newspaper), we shall refer to the parties' Joint Appendix by the signal J.A. We shall at various points cite to the Briefs of the Globe and of the

In the course of preliminary hearings in the underlying trial of the forcible rape of three teenaged girls, the office of the district attorney purported to waive the statutory policy of closure out of concern for a Sixth Amendment objection of the accused (J.A. 18a) and upon consultation with the three victim witnesses (J.A. 28a-29a). In light of the mandatory language of the closure statute, both the trial judge and the single justice of the Supreme Judicial Court overrode that offer (J.A. 17a-18a, 42a-44a).

Thereafter, despite the prosecutor's earlier account of the three victims' willingness to waive closure, and still prior to the completion of jury selection, the assistant district attorney reported to the trial judge that the girls were expressing "privacy concerns" and that they were willing to have the press present only upon a "guarantee" by the court that "the press would not print their names or where they go to school or any personal data or take pictures of them or attempt to interview them." The prosecuting attorney related that the girls were acting both out of their own sense of privacy and out of concern for several grandparents kept unaware of their victimization (J.A. 48a).[2] The trial judge received this information and continued to apply the mandatory terms of the statute.

---

four sets of Amici Curiae. The latter are (1) Amici led by the American Broadcasting Company (the ABC Amici); (2) those led by the Miami Herald Publishing Company (the Miami Herald Amici); (3) the National Broadcasting Company or NBC; (4) and the Reporters Committee for Freedom of the Press (the Reporters Committee).

[2] As we shall discuss below, this undisputed fact is salient for a number of reasons. It reflects the uncertainty and unreliability of any prior waiver decision on the part of the three juveniles, even those at the upper edge of the age span covered by the statute. It calls into question the quality of consultation rendered on the waiver choice by a prosecutor primarily concerned with the prospective loss of a conviction upon grounds of the defendant's Sixth Amendment rights. It demonstrates that the victims accepted the attendance of the press only upon terms of a prior restraint or gag order constitutionally forbidden to the trial court. And, most significantly, it casts a full and

As part of its original motion to revoke closure as presented to the trial judge in the course of preliminary hearings, the Globe "move[d] that a transcript of the proceedings be made available" (J.A. 12a). However, as the newspaper acknowledged in the course of oral argument before the Supreme Judicial Court in its initial appeal (J.A. 59a-87a), it did not subsequently pursue a copy of the trial transcript.[3]

Summary of the Argument.

I. The operation of the Massachusetts closure statute differs materially from the circumstances of the *Richmond Newspapers* case because it shields only the testimony of a specific witness by reason of her youth and victimization to a crime of sexual assault; it does not close an entire trial for reasons unexplained.

II. The newspaper's Sixth Amendment claim to trial access is unavailing because such an entitlement belongs exclusively

---

accurate light upon the pervasive and highly colored assertion of the Globe and the Amici to the effect that neither the prosecutor nor the victims wanted their testimony closed. See the Globe's Brief at the opening page, final phrase of the Question Presented, 2, 5, 6-7, 15, 22-23, 32, 34, 39-40; the Brief of the ABC Amici at 19 ("There is not even a suggestion that the victims were reluctant to come forward and testify or that they would be embarrassed by giving testimony in a public trial."), 21-22; the Brief of the Miami Herald Amici at 8 ("the Massachusetts Court here dismissed the appeal of the closure of an entire trial where *all participants* wanted the case to be tried in public . . ." [emphasis original]; and Brief of the Amicus NBC at 5.

[3] The Globe's decision not to pursue the trial transcript may have resulted from the publication of a series of articles by the nearby Quincy Patriot Ledger. An editor of that newspaper had served as forewoman of the jury and had immediately afterward published a three-part synopsis of the proceeding (J.A. 49a-57a).

to the criminal defendant and because the closure statute in any event would meet such a constitutional standard upon the same grounds supporting its validity under the First Amendment.

III. The closure law satisfies the press's First Amendment right of access to criminal trials because it does not contradict an historical practice of general openness for the testimony of minor victims of sexual assault; because it safeguards the child and her testimony from the trauma of public confrontation at trial; and with such an assurance induces her cooperation and perseverance through the arduous prosecution of a category of crime characteristically underreported; and because it does not interfere with a flow of information necessary for self-government.

As a matter of common law tradition and trial practice, both English and American courts have never made the testimony of a youthful victim of sexual crime a uniformly open moment, but rather through decisional and legislative rules have been inclined to shelter her appearance as an exception to the principle of publicity.

The assured closure of the young victim's testimony relieves her of the central foreboding of the rape prosecutrix; it sustains her cooperation through difficult pretrial stages; it assists her against sensations of humiliation and embarrassment and more serious psychological harm generated by a trial process often geared to impugn the victim; it improves the quality of her testimony against understandable fright and confusion; and in net effect it contributes to just convictions for a personally destructive and widely underprosecuted offense. The substitution of a discretionary or case-by-case closure of a juvenile's appearance would deprive the present law of its prospective certainty in behalf of the victim, render her the subject of a potentially unwieldy and stressful pretrial hearings, and risk the quality of her evidence.

Temporary closure does not restrict the flow of significant information because it leaves open the entire remainder of the trial including the testimony of police, of medical and scientific witnesses, of corroborative witnesses for both sides, and of the defendant, as well as the performances of counsel, the judge and the jury. A transcript of the minor victim's testimony will usually be available. And the exceptional victim or her family desiring publicity for her experience remains entirely free to communicate with the press independently of her trial appearance.

Argument.

I. The Operation of the Massachusetts Closure Statute Differs from the Circumstances of the *Richmond Newspaper Case*.

The present appeal comes to the Court as the result of two extensive decisions of the Massachusetts Supreme Judicial Court upon a subject of emerging constitutional doctrine and humane law enforcement: the entitlement of the state and the juvenile victim of sexual assault to offer sheltered testimony at the criminal trial of her alleged assailant. In the first decision, *Globe Newspaper Co.* v. *Superior Court*, Mass. Adv. Sh. 485, 401 N.E.2d 360 (1980); J.A. 59a-87a (hereinafter *Globe I*), the court construed and applied the challenged Massachusetts closure statute in light of the then recent decision of *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979). It determined that by statutory construction it could effectively obviate the constitutional problems asserted by the Globe. "Although we do not squarely reach the constitutional questions raised today, we believe that the principles of construction we adopt bring

us to a conclusion which approximates the results urged upon us by the Globe on constitutional grounds" (J.A. at 68a). And it observed, "[t]his approximate parallelism extends not only to the substantive doctrine, but also to procedural safeguards" (J.A. at 68a n.5). Employing canons of strict construction designed to minimize constitutional doubt and any exception to the common law principle of publicity (J.A. 36a, 69a-70a), the court interpreted the challenged law to command a trial judge to close trial proceedings only during the testimony of a minor victim of rape or sexual assault; to permit a trial judge to close other portions of the trial if, in the exercise of sound discretion, he found such a measure necessary to accomplish the statutory purpose to preserve evidence necessary for a just conviction; and to require a trial judge to conduct a hearing, open to participation by representatives of the press and public, as a prerequisite to closure of any part of the trial beyond the testimony of the minor victim (J.A. at 75a-79a). The latter procedure seemed necessary because, "[a]lthough we have not ruled that the [press] has a constitutional interest, this view is consistent with the view that a party receive a hearing before suffering the deprivation of such an interest [citing relevant passages of the concurring opinion of Justice Powell and the concurring-and-dissenting opinion of Justice Blackmun in *Gannet Co.* v. *DePasquale*, 443 U.S. 368, 400-401, 445-446]" (J.A. at 78a). In *Globe I* the court deferred consideration of the newspaper's constitutional contentions until the decision of the then pending *Richmond Newspapers* appeal (J.A. at 66a-67a).

In the second instance, *Globe Newspaper Company* v. *Superior Court*, Mass. Adv. Sh. 1493, 423 N.E.2d 773 (1981); J.A. 91a-107a (hereinafter *Globe II*), the court tested the construed closure statute by the First Amendment standards announced in *Richmond Newspapers* and upheld its constitu-

tionality.[4] It declined to entertain the Globe's renewal of a Sixth Amendment attack against the statute for lack of standing (J.A. 93a-94a). Upon First Amendment grounds it concluded (1) that the closure of the testimony of a juvenile victim of a sexual assault did not violate the same tradition of open proceedings as the closure of an entire trial, (2) that such a closure did not impede the flow of information necessary to the functioning of democratic institutions, (3) and that such closure served important state interests without unnecessary restriction of the rights of press and public to trial attendance (J.A. 98a-105a).

The challenged statute, as construed below then, conveys a case materially different from the episode of *Richmond Newspapers*. It operates only upon crimes of a particular category, sexual assault.[5] It works in behalf of juvenile victims only. It closes the testimony of a particular witness, not an entire trial. It does so for well explained reasons of policy, not for reasons of unknown and unknowable judicial discretion. As to all further closure it extends the full measure of hearings, findings, and reasoning sought by the press and required by the appellate courts for informed judicial review. The question now framed is whether even so circumscribed a statutory policy and procedure violate the press's constitutional right of trial attendance.

---

[4] During the interim between *Globe I* and *Globe II*, the newspaper had docketed an appeal in this Court, No. 79-1862. After the announcement of *Richmond Newspapers*, the Court remanded the case to the Supreme Judicial Court for consideration of the constitutional issue, 449 U.S. 894 (1980).

[5] *Globe II*, J.A. 98a n.11. The authoritative interpretation sought to eliminate all possible overbreadth and to fit the statutory objectives within the constitutional standards unfolding in *Gannett* and *Richmond Newspapers*. In this tradition see *Broadrick* v. *Oklahoma*, 413 U.S. 601, 613-615 (1973); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572-574 (1942); and *Cox* v. *New Hampshire*, 312 U.S. 569, 575-576 (1941).

II. The Newspaper's Sixth Amendment Contention Lacks Merit: The Globe Does Not Have Standing to Pursue The Theory, and In Substance the Closure Statute Does Not Violate a Putative Sixth Amendment Right of Trial Access.

The Globe has renewed a Sixth Amendment challenge to the closure statute (Brief at 40-50) upon grounds (1) that it possesses representative standing in behalf of the public (*id.* 40-46), (2) that it possesses similar standing in behalf of an acquitted defendant who had opposed closure (*id.* 46-48), and (3) that Mass. G.L. c. 278, § 16A substantively violates the Sixth Amendment since it closes an element of the trial proper rather than merely a pretrial hearing as permitted by a majority of the Court in the *Gannett* case (*id.* 49-50).[6] For a variety of reasons the Sixth Amendment claim should fail.

In neither case below did the Supreme Judicial Court discuss or decide a Sixth Amendment challenge. In *Globe I* it observed that the acquitted defendant was not before the court (J.A. 67a); in *Globe II* it reemphasized its view that the Sixth Amendment right belonged exclusively to the accused (J.A. 92a-94a & nn. 5-6). Consequently, no Sixth Amendment rationale or holding appears in the case to date. That result accords with this Court's remand directing reconsideration of *Globe I* in light of the *Richmond Newspapers* decision. 449 U.S. 894 (1980). The lower court responded appropriately with a First Amendment analysis and regarded the Sixth as beyond the case (J.A. 94a n.5, second paragraph).

The Globe's assertion of Sixth Amendment standing as a member of the public is unsound (Brief at 40-46). That contention rests upon the distinction left by *Gannett* between

---

[6] Only one of the Amici has addressed a Sixth Amendment claim (Brief of the Reporters Committee at 24-30).

pretrial and trial proceedings. While the newspaper acknowledges that it would have no Sixth Amendment right of access to pretrial hearings (Brief at 42), it claims such an entitlement to trial proceedings upon the ground that the usual public benefits of openness qualify it to renew the contention in the general public interest (*id.* at 42-46). The short answer would appear to be that the Court has now chosen the First Amendment, rather than the Sixth, as the vehicle for press and public attendance at criminal trials. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 575-578, 580 (1980) (plurality opinion); *id.* at 584 (concurring opinion of Justice Stevens); *id.* at 597-598 (concurring opinion of Justice Brennan joined by Justice Marshall); *id.* at 599 (concurring opinion of Justice Brennan). Indeed even those justices who would have preferred to situate the right of trial access in the Sixth Amendment accepted the First Amendment holding. *Id.* at 581-582 (concurring opinion of Justice White); *id.* at 603-604 (concurring opinion of Justice Blackmun).[7]

In the alternative, the Globe proposes representative standing in behalf of an acquitted criminal defendant having unsuccessfully opposed closure of the juvenile victim's testimony (Brief at 46-48). It theorizes an amalgamation of interests between the accused and the newspaper because the former is a donor and the latter a recipient of trial information and because acquittal constitutes a practical impediment to the presentation of the accused's own interest in publicity (Brief at 46-48).

However this congruence of interests is not realistic. An accused opposing the temporary closure of testimony by a young

---

[7] Justice Blackmun, whose exhaustive separate opinion in *Gannett* had elaborated a Sixth Amendment theory, concurred that, although still troublesome to him, the First Amendment "route . . . has been selected and, at least for now, we must live with it." 448 U.S. at 603.

victim will more often be seeking tactical, rather than socially beneficial, objectives. His purpose is more likely to be the inhibition of the child's effective testimony than the promotion of the values of openness served by the press.[8] Nor does any insuperable "genuine obstacle" bar the criminal defendant from the presentation of his own interest against closure of the juvenile victim's testimony and therefore require surrogate representation by the newspaper. For the convicted defendant, the usual appellate procedure remains available. For any Massachusetts defendant a pretrial avenue of interlocutory appeal remains open under the very statute employed by the Globe to commence the present lawsuit against the closure order. Under the Supreme Judicial Court's statutory authority of general superintendence over all inferior courts,[9] the criminal defendant here could have sought rescission of closure. That court has granted interlocutory relief in a number of criminal proceedings in which it questioned the adequacy of appellate review to safeguard the defendant's

---

[8] See B.A. Morosco, *The Prosecution and Defense of Sex Crimes* § 4.03 (1978):

> There will be occasions in which the defendant himself is not desirous of the notoriety that a public trial will produce, and will consent to the exclusion of the public. However, this is more often the case in consensual sex offenses, because the defense knows full well that the victim as a witness in a forcible sex offense will be more likely shaken by the experience of testifying in a public court room, and therefore more vulnerable upon cross-examination.

[9] Massachusetts G. L. c. 211, § 3, authorizes an original action in the Supreme Judicial Court for collateral interlocutory relief in behalf of a party aggrieved by a lower court ruling and able to make a preliminary showing that the usual appellate process will not provide a practicable remedy. A single justice of the court is continuously available to hear such actions and their usual prayers for preliminary injunctive relief. See J.A. 8a-11a, 19a-42a.

interests.[10] No obstacle prevented such an application in the criminal trial underlying this case.[11]

In the case of an acquittal, the Globe faces the additional bar of mootness. The exonerated defendant has no continuing stake in the question of trial publicity. He is not a person experiencing an ongoing injury yet unable to present it to a court and therefore in need of third-party representation. When he does suffer the injury of conviction and wishes to attack closure, he is capable of doing so directly in his own behalf. The lack of injury to an absent party separates the present category of case from those invoked by the Globe as examples of substituted standing.[12] If an acquitted defendant experi-

---

[10] See, *e.g.*, *Blaisdell* v. *Commonwealth*, 372 Mass. 753, 755, 364 N.E.2d 191, 194 (1977) (question involving the privilege against self-incrimination); *LaTaille* v. *District Court of Eastern Hampden*, 366 Mass. 525, 526-527, 320 N.E.2d 877, 878-879 (1974) (rape defendant's entitlement to probable cause hearing); and *Corey* v. *Commonwealth*, 364 Mass. 137, 138, 301 N.E.2d 450, 452 (1973) (criminal defendant's right to confrontation at probable cause hearing).

[11] Because the trial judge read the statute to close the entire trial and not simply the victim's testimony (J.A. 17a-18a), such an application would have been a strong candidate for at least partial relief. *Globe I*, J.A. 74a; *United States* v. *Hernandez*, 608 F.2d 741, 747 (9th Cir. 1979); *United States* v. *Eisner*, 533 F.2d 987, 993-994 (6th Cir.), *cert. denied*, 429 U.S. 919 (1976); *United States* v. *Kobli*, 172 F.2d 919, 921 (3d Cir. 1949); and *Tanksley* v. *United States*, 145 F.2d 58, 59 (9th Cir. 1944) (all to the effect that total closure presumptively prejudices the criminal defendant's Sixth Amendment right to a public trial).

[12] Globe Brief at 46-48.

Contrast the ongoing grievances of the absent parties in *Barrows* v. *Jackson*, 346 U.S. 249, 255-259 (1953) (defendant property owner sued for breach of racially restrictive real estate covenant may assert constitutional rights of non-caucasian buyers); *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965); *Eisenstadt* v. *Baird*, 405 U.S. 438, 445-446 (1972) and *Carey* v. *Population Services International*, 431 U.S. 678, 682-684 (1977) (distributors of contraceptives may represent the constitutional rights of persons to receive them); and *Singleton* v. *Wulff*, 428 U.S. 106, 113-118 (1976) (physicians may represent patients' claim to publicly funded abortions) (plurality opin-

ences a sense of lingering stigma from the criminal process, he remains free to seek private legal redress and countervailing publicity in collaboration with the press.

The newspaper, then, is attempting to borrow an interest both alien[13] and extinct. It is twice removed from a Sixth Amendment claim of its own by hurdles of standing and mootness. It does not seem able to overcome either, let alone both. Indeed, the very attentuation of the reasoning necessary for a Sixth Amendment claim in these circumstances militates against the effort when relatively straightforward doctrine is now available from the First Amendment. The present consideration need not extend to the Sixth Amendment argument.

Finally, if the Court were now to assign a right of press and public attendance at criminal trials to the Sixth as well as the First Amendment, that right would serve the same values of openness described by Justice Blackmun in his separate opinion in *Gannett* and later by the plurality and concurring Justices in *Richmond Newspapers*. The Globe ascribes the same content to either Amendment (Brief at 41-45). For the following common reasons, therefore, the Commonwealth believes

---

ion). In these instances, the absent party continued to want goods or services from the provider litigating its right to supply them. The analogy does not extend to the present case. An acquitted defendant has no running need for the service of trial publicity from a newspaper. If he desires post-acquittal publicity for further vindication, nothing in Mass. G.L. c. 278, § 16A prevents it.

[13] Significantly, with the court's constriction of § 16A's mandatory closure to the testimony of the juvenile victim, the statute does not deprive a criminal victim of a Sixth Amendment "public trial" but only of the simultaneously public testimony of the victim witness. It will remain for an affected criminal defendant to argue that such limited closure effectively denied him a public trial within the meaning of the Sixth Amendment. The outcome of such an argument may well turn upon the particular circumstances of each criminal trial, especially the duration of closure. See, *e.g.*, *United States ex rel. Smallwood* v. *LaValle*, 377 F.Supp. 1148, 1151 (E.D.N.Y. 1974); *Butler* v. *Smith*, 416 F.Supp. 1151, 1154 (S.D.N.Y. 1976).

that the closure statute would satisfy the standards of both a Sixth Amendment and a First Amendment right of public access to criminal trials.

III. The Massachusetts Closure Law Satisfies the Press's First Amendment Right of Access to Criminal Trials.

A. *In English and American Practice, the Testimony of Juvenile Victims of Sexual Offenses Has Not Been a Portion of Criminal Trials Traditionally or Consistently Open to the Public and Therefore Should Not Be Absorbed Automatically into a First Amendment Right of Press Attendance.*

In *Richmond Newspapers* the judgment of the Court derived from an historical analysis and conclusion that throughout English and American experience the conduct of criminal trials has been a process open to the press and public.[14] The role of history was important to the judgment because the First Amendment does not literally address the question of press and public attendance at criminal trials. In addition, historical practice confirmed the social utility of open proceedings.[15] The present case requires this analysis to proceed one step further to the question whether a tradition of openness has governed not only criminal trials generally but also the testimony of juvenile victims of sexual offenses within such trials. An in-

---

[14] Plurality opinion of the Chief Justice joined by Justices White and Stevens, 448 U.S. at 564-569; concurring opinion of Justice Brennan, joined by Justice Marshall, *id.* at 589-593; and concurring opinions of Justice Stewart, *id.* at 599, and of Justice Blackmun, *id.* at 601.

[15] Plurality opinion, 448 U.S. at 577, 580; concurring opinion of Justice Brennan, *id.* at 589 ("Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience.")

quiry into English and American practice points against such a practice. Experience instead demonstrates that closure, or partial closure, has proved common in those classes of cases; and it implies a judgment that such measures have served important independent values.

1. The English Tradition.

The English practice materializes from the comments of treatise writers, later decisional law, and more modern legislation. It evidences an early and enduring solicitude for the treatment of children in court. That concern has functioned through not only the exercise of judicial discretion but also the operation of binding rules, both common law and statutory.

Pollack and Maitland detected that as early as the thirteenth century the English concept of *parens patriae*, or judicial guardianship, over children had become firmly rooted. The justices of the courts, in behalf of the king, were the "guardian of guardians" and superseded the authority of self-constituted "next friends" or guardians ad litem. By this period "[t]he king's justices see no great reason why every infant should have a permanent guardian, because they believe that they can do full justice to infants." F. Pollack & F.W. Maitland, 2 *The History of English Law*, 445 (2d ed. 1899). The early common law scholars made glancing but suggestive references to the status of children in the courts.[16] By the end of the sixteenth century, Coke was able to identify statutes authorizing minors in civil matters to sue through a next friend and to be relieved of personal appearances in court. 2 E. Coke, *Insti-*

---

[16] In their discussions of the usual openness of the common law courts, neither Hale nor Coke nor Blackstone directly addressed the question whether openness worked with customary force upon the testimony of child victims at criminal trials. M. Hale, *The History of the Common Law of England* 343-345 (6th ed. 1820); 3 W. Blackstone, *Commentaries* 372-373 (21st ed. 1844); 2 E. Coke, *Institutes of the Laws of England* 103 (7th ed. 1817).

tutes of the Laws of England 261, 390 (7th ed. 1817). More particularly as to juvenile victims of rape, Blackstone expressed concern over their testimonial capacity and urged that any conviction require the corroboration of independent testimony. 4 W. Blackstone, *Commentaries* 214 (21st ed. 1844). Subsequently, Edward Jenks summarized the doctrine prevalent between the late eighteenth and early twentieth centuries, *The Book of English Law* 92 (1st ed. 1928):

> The exceptions to the rule of open court are very rare, consisting practically only of three cases: (1) where children are, unhappily, required to give evidence in cases involving decency or morality; (2) [trials litigating trade secrets]; (3) [trials exposing state secrets].

Decisional law also supports the conclusion that judicial proceedings requiring the appearance of children comprised a well-recognized exception to the principle of publicity. The most cited and thorough discussion appears in the case of *Scott* v. *Scott*, [1913] A.C. 417; [1911-1913] All E.R. Rep. 1, rendered by the House of Lords in an annulment controversy. The issue before the five law lords was whether a probate judge and an appellate court had correctly determined that the judge could hear in private an annulment action on grounds of impotency and could properly punish as contempt the subsequent publication of the stenographer's notes of the proceedings by one of the parties and her solicitor. The lords acknowledged that probate judges had often held such hearings *in camera* but concluded that the general principle of publicity should extend nonetheless to annulment proceedings.

The serial opinions in *Scott* reviewed the law and practice from the early history of the ecclesiastical courts to the 1913 date of decision. The lords assembled five classes of cases in

which the trial court could proceed privately and in which it could exercise the contempt power to enforce nondisclosure: litigation concerning (1) "lunatics," (2) wards of the court, (3) trade secrets, (4) subjects so delicate or painful as to deter witnesses from public testimony or victims from efforts at redress, and (5) subjects covered specifically by legislation, such as minor victims of crime. See *Scott* v. *Scott*, [1913] A.C. 417, 437-438 (opinion of Lord Chancellor Haldane), 441-442 (opinion of Earl of Halisbury), 445-446 (opinion of Earl Loreburn), 462 (opinion of Lord Atkinson), 482-485 (opinion of Lord Shaw). The policies underlying several of those categories are significant.

The exception for wards of the court rested upon its role as *parens patriae* toward the child. *Scott*, *supra*, at 482-483 (per Lord Shaw). The court, on behalf of the sovereign, afforded the child special protection as a departure from its usually detached relationship with parties and witnesses before it. See also *Re R (MJ) (an infant)*, [1975] 2 All E.R. 749, 753 (suggesting that the law lords in *Scott* would have required a private hearing if the action had involved minors) and *Re F (a minor)*, [1976] 3 All E.R. 274, 282 (same suggestion: "in wardship the court invariably sits in private").[17]

Also relevant is the exception for sensitive or painful subject matter tending to inhibit the cooperation and testimony of victims and witnesses. "If the evidence to be given is of such a character that it would be impracticable to force an unwilling witness to give it in public, the case may come within the ex-

---

[17] The lower court's description of the legislative purpose of the closure statute is similar (J.A. at 71a):

> [The] legislative history reveals that [the statute] stands at the nexus of two overlapping strands of policy: the Legislature wished to shield certain victims of sex crimes from the difficult experience of testifying in public; and the Legislature joined this solicitude for victims with the broad, paternal protection afforded children generally.

ception to the principle [of publicity] . . . in English Courts of justice." *Scott*, *supra*, at 439 (per Lord Haldane). Similarly, "if the Court is satisfied that to insist upon publicity would in the circumstances reasonably deter a party from seeking redress, or interfere with the effective trial of the cause, in my opinion an order for hearing or partial hearing in camera may lawfully be made." *Id.* at 446 (per Lord Loreburn).

These passages and their related discussion do not establish a custom that in all cases involving sexual crime or the affairs of minors the English courts reflexively abandoned the principle of publicity. However, they do show those courts' receptiveness to witnesses and victims understandably reluctant to air sensitive information in public and the same courts' accommodation of customary openness to the demands of full and accurate fact finding and consequent justice.

Wholly apart from these common law rules of closure, legislation authorized or directed courts to close the testimony of juvenile victims and witnesses. As early as the Scottish Act of June 12, 1693, exempting from public trial cases of "rap[e], adultery, and the like" [see *Scott*, *supra* at 475 per Lord Shaw], Parliament had defined categorical exceptions to the general principle of openness. Early twentieth century enactments focused upon children. The Incest Act of 1908 mandated "all proceedings" under the Act for the punishment of incest "to be held in camera." Punishment of Incest Act of 1908, 8 Edw. 7, c. 45, § 5. Similarly the Children Act of 1908, 8 Edw. 7, c. 67, § 114, authorized closure during the testimony of a "child or young person" in trial of any offense against "decency and morality." So too did the Children and Young Persons Act of 1933, 23 Geo. 5, c. 12, § 37, with the proviso that its language did not authorize exclusion of "bona fide" representatives of a newspaper or news agency. At the same time, however, the Act expressly empowered the presiding judge to impose prior restraint upon the attending press representatives. *Id.* at § 39.

In the setting of trials involving juvenile participants, the English use of prior restraint in lieu of closure is an additional element of practice. An English newspaper printing an account of its observations at a closed hearing or an account of the observations of others exposes itself and its personnel to a finding of contempt and punishment by fine or imprisonment. *See Re De Beaujue*, [1949] 1 All E.R. 439; *Re R (MJ) (an infant)* [1975] 2 All E.R. 439; *Re F (a minor)*, [1976] 3 All E.R. 274; Administration of Justice Act of 1960, 8 & 9 Eliz. 2, c. 65, §§ 11-12. *See also Re Clement*, [1822] 147 E.R. 404 (separate criminal trials of codefendants closed until all trials concluded; published account of first trial punished by contempt). Thus, although the press might attend certain classes of closed hearings, it remained subject to stringent gag orders.[18]

In sum, while the English tradition does generally support the presumptive openness of criminal trials, it does not support the general extension of publicity to the trials of sexual offenses involving minors, especially to the testimony of children within those proceedings. English common law solicitude for children in adjudicatory proceedings, concern for witnesses and victims and their uninhibited evidence, longstanding legislative protection for minors appearing in the trials of sexual crimes, and the judicial application of prior restraint converge toward the conclusion that the English press would be, and long has been, subject to serious restriction in a case of the present kind.[19]

---

[18] Such restrictions, of course, are anathema to First Amendment doctrine. *Oklahoma Publishing Co.* v. *District Court of Oklahoma County*, 430 U.S. 308 (1977); *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 556-562 (1976). In contrast with his English counterpart, then, the American trial judge must rely upon closure as an exclusive compulsory measure in behalf of a juvenile victim.

[19] The qualification gains relevance in light of Justice Blackmun's observation, with authorities, that "[t]he continuing development in England of the common-law notion of publicity during the years since the founding of our

2. The American Tradition.

Nor does the historical practice in American jurisdictions evidence a uniform openness of the trials of sexual offenses involving minor victims or witnesses. By a variety of devices, the state and the federal courts have employed complete or qualified closure to protect the emotions of juveniles as victims and witnesses, and to preserve their testimony. Consequently, after a thorough explanation of the history and utility of public trials, Professor Wigmore observed that rational exceptions had evolved both as matters of judicial discretion and legislation. 6 Wigmore, *Evidence* § 1835 (Chadbourn rev. 1976). As to the latter:

> By statute in most states [closure is] expressly sanctioned, either in general terms, or for *special classes of cases*, such as divorce, rape, and the like, or for *special classes of persons*, such as minors. (Footnote omitted; emphasis original).

Id. n.2 (statutes collected from British, Irish, Canadian and American jurisdictions). As of the end of 1981, 20 states other than Massachusetts maintained closure statutes of some degree.[20] In addition, four have authorized the use of video-

---

own Nation casts light upon the function of publicity in our system of justice." *Gannett* v. *DePasquale*, 443 U.S. at 423-424 n.8 (opinion concurring in part and dissenting in part).

[20] Ala. Const. 1901, art. VI, § 169 and Ala. Code § 12-21-20 (1979); Ariz. R. Civ. P. 9.3 (1973); Colo. R. Civ. P. 42(c) (1973); Del. Code Ann. 1981 Replacement Volume § 1516(a); Fla. Stat. Ann. § 918.16 (West Supp. 1980); Ga. Code § 81-1006 (1956 Rev.); Idaho R. Civ. P. 77(b) (1978 Supp.); Ill. Stat. Ann. c. 70, § 76 (Smith-Hurd); Iowa Code § 675.20 (1971); Mich. Comp. Laws § 766.9 (1968); Miss. Const. art 3, § 26 (1972); Mont. Rev. Codes Ann. § 3-1-313 (1979); N.Y. Jud. Law § 4 (McKinney 1968);

taped deposition testimony[21] and two states the use of transcribed deposition testimony[22] of victims of sexual assault at trial so as to eliminate the trauma of open-court appearances.

As a matter of American common law, federal and state courts have long recognized the inherent authority of a trial judge to close trials of sexual assault in whole or part even over federal and state constitutional objections of an accused in order to achieve the purposes of effective testimony from a juvenile or vulnerable adult victim witness.[23]

N.C. Gen. Stat. § 15-166 (1976); N.D. Cent. Code § 27-01-02 (1981 Supp.); N.H. Rev. Stat. Ann. § 632-A:8 (1979); Utah Code Ann. § 78-7-4 (1953); Vt. Stat. Ann. Tit. 12, § 1901 (1973); W. Va. Code § 48-2-23 (1966); and Wis. Stat. § 970.03 (4) (1977).

[21] See Ariz. Rev. St. Ann. § 12-2312; Fla. Stat. Ann. § 918.7 (West Supp. 1980); Mont. Rev. Code Ann. § 46-15-401; and N.M. Stat. Ann. § 30-9-17.

[22] S.C. Code § 16-3-660 (1976); and Va. Code § 18.2-67 (1965).

[23] See *e.g.*, *United States ex rel. Latimore* v. *Sielaff*, 561 F.2d 691, 694-696 (7th Cir. 1977) (closure of testimony of twenty-one year old victim of multiple rapes by several defendants; press permitted to remain); *Harris* v. *Stephens*, 361 F.2d 888, 891 (8th Cir. 1966), *cert. denied sub nom. Harris* v. *Bishop*, 386 U.S. 964 (1967) (closure of testimony of twenty-three year old rape victim); *United States* v. *Giese*, 158 F.Supp. 821, 824 (D. Alaska), *aff'd*, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959) (closure of testimony of victim aged nine at trial, and of other witnesses aged seven and eleven); *State* v. *Smith*, 123 Ariz. 243, 249-250 (1979) (exclusion of spectators during adult rape victim's testimony); *Hogan* v. *State*, 191 Ark. 437, 438-440 (1935) (exclusion of the public during testimony of ten year old rape victim); *People* v. *Swafford*, 65 Cal. 223, 224 (1884) (exclusion of public from trial of abduction of a minor for purposes of prostitution); *Benedict* v. *People*, 23 Colo. 126, 128-129 (1896) (judge properly excluded the general public from a trial for sodomy); *State* v. *Purvis*, 157 Conn. 198, 207 (1968), *cert. denied*, 395 U.S. 928 (1969) (closure of trial requiring juvenile witnesses to testify to details of rape); *State* v. *Gionfriddo*, 154 Conn. 90, 93 (1966) (similar circumstances); *Bivins* v. *State*, 313 So.2d 471, 472 (Fla. App. 1972) (exclusion of public during victim's testimony); *Beauchamp* v. *Cahill*, 297 Ky. 505, 180 S.W.2d 423 (1944) (closure for children's testimony to details of sexual assault); *State* v. *Callahan*, 100 Minn. 63, 69 (1907) (trial judge properly cleared the courtroom when the adult rape victim became unable to testify

In a survey of the subjects historically excepted from the general rule of publicity, the Court of Appeals for the Second Circuit has concluded that "[i]t has long been recognized . . . that the need to protect young complaining witnesses in rape cases against embarrassment, harassment and loss of reputation will suffice to invoke the shelter of limited privacy upon criminal proceedings." *Stamicarban, N.V.* v. *American Cyanamid Co.*, 506 F.2d 532, 539-540 (2d Cir. 1974) (per Kaufman, C.J.; emphasis supplied; citations omitted).

The American practice for cases of the present kind is one of diversity. We do not argue that the state and federal courts have developed a monolithic policy of closure in cases of sexual offenses upon minors. Rather, different jurisdictions have implemented varying closure procedures expressed as constitutional, statutory or decisional law. These procedures have promoted the same ends as the statute under attack. The limited but telling point is that the public and the press have not enjoyed, in the words of the *Richmond Newspapers* plurality, "an unbroken uncontradicted history" of attendance,[24] nor in Justice Brennan's phrase, "an enduring and vital tradition of public entree"[25] to the trial testimony of minor rape victims.[26] Indeed, in *Gannett Co.* v. *DePasquale*, the

---

in the presence of the crowd); *Commonwealth* v. *Stevens*, 237 Pa. Super. 457, 466-468 (1975) (closure of adult rape victim's testimony to prevent embarrassment and harm to reputation); *State* v. *Padilla*, 91 N.M. 800, 802-803 (1978) (trial judge clears courtroom of all "disinterested" spectators during testimony of adult prosecutrix); *State* v. *Santos*, ____ R.I. ____, ____, 413 A.2d 58, 62-64 (1980) (closure of adult victim's testimony against anticipated distress; cases collected); *Price* v. *State*, 496 S.W.2d 103, 108 (Tex. Crim. App. 1973) (trial judge properly cleared court during testimony of adult rape victim, but permitted press representatives to remain).

[24] 448 U.S. at 573.

[25] 448 U.S. at 589.

[26] To the extent that the Globe asserted a history of uninterrupted open trials, the Supreme Judicial Court correctly identified the closure of the

Court recognized the "tradition of publicity has not been universal," and as prime exceptions cited "cases involving violent crimes against minors" and the practice of temporary public exclusion from trials "during testimony of certain witnesses." 443 U.S. at 388 n.19 (citations omitted). Neither the English nor the American tradition, then, permits the mechanical extension of the historical openness of criminal trials in general to the trials of sexual crimes against minors in particular.

B. *The Closure of a Juvenile Victim's Testimony Serves Overriding State Purposes: It Protects the Child from the Additional Trauma of Public Testimony, Sustains Her Cooperation Through the Prosecutorial Process, and Enables Just Convictions in a Pernicious and Often Undetectable Genus of Crime.*

All seven Justices supporting the judgment of *Richmond Newspapers* agreed that the First Amendment right of access to criminal trials was a qualified entitlement subject to overriding exceptions. The exceptions included such considerations as orderly proceedings, state secrets, the preservation of trade secrets, the confidential identity of informants, the government's need for just convictions, and the sensibilities of

---

testimony of both adult and minor victims of sexual assault as a "notable exception" to such a portrayal (J.A. at 98a). Modern commentators have appreciated the exception even as they have praised the general principle of publicity. See 6 Wigmore, *Evidence* (Chadbourn Rev. 1976) §§ 1834-1835. See also Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 V. Pa. L. Rev. 1, 10, 13 (1961) (an article cited approvingly by the plurality in *Richmond Newspapers*, 448 U.S. at 571) for the observation that proceedings involving juveniles and sexual offenses were a distinct exception to the rule of publicity.

youthful prosecution witnesses.[27] Reviewing the Massachusetts law in light of *Richmond Newspapers*, the Supreme Judicial Court identified several state objectives deserving a reasonable exemption from the rule of unlimited trial access: the encouragement of minor victims to come forward to institute complaints and to give testimony; the protection of such victims from public embarrassment, demoralization, and psychological damage; the increased reliability of testimony from juveniles free of confusion, fright, or embellishment; the sound and orderly administration of justice; and the preservation of evidence necessary for just convictions (J.A. 101a).

These objectives enjoy broad substantiation. Through a burgeoning volume of legal and empirical literature, courts, commentators, researchers, law enforcement agencies, and legislatures have in recent years identified the ordeal of the rape victim generally[28] and of the juvenile rape victim par-

---

[27] See the plurality opinion of the Chief Justice joined by Justices White and Stevens, 448 U.S. at 581-582 n.18, the concurring opinion of Justice Brennan joined by Justice Marshall, *id.* at 598 nn.23-24, the concurring opinion of Justice Stewart, *id.* at 600 n.5, and the concurring opinion of Justice Blackmun, *id.* at 603.

Mr. Justice Powell, who did not participate in *Richmond Newspapers*, had earlier espoused a First Amendment right of press access in *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 398 (concurring opinion), and added that the right was "limited both by the constitutional right of defendants to a fair trial . . . and by the needs of government to obtain just convictions and to preserve the confidentiality of sensitive information . . . ."

[28] See, *e.g.*, J. Bode, *Fighting Back*, c. 7 (1978); L. Brodyaga, M. Gates, S. Singer, M. Tucker & R. White, *Rape and Its Victims, A Report for Citizens, Health Facilities, and Criminal Justice Agencies*, cc. 8-9 (1975) (hereinafter LEAA Report); E. Hilberman, *The Rape Victim*, cc. 2, 7-8 (1976); L.L. Holmstrom & A. W. Burgess, *The Victim of Rape*, cc. 6-8 (1978); S. Katz and M. Mazur, *Understanding the Rape Victim*, cc. 12, 14-15 (1979); J. MacDonald, *Rape Offenders and Their Victims*, 128-130 (1971); B.A. Morosco, *The Prosecution and Defense of Sex Crimes*, §§ 1.03[b], 4.03[1] (1978); C. Bohmer, *Judicial Attitudes Toward Rape Victims*, appearing as c. 8 in *Forcible Rape*, (D. Chappell, R. Geis & G. Geis eds. 1977); Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 Judicature 391

ticularly.[29] This Court has described the unique harm of the crime, *Coker* v. *Georgia*, 433 U.S. 584, 597-598 (1977):

> Short of homicide, it is the "ultimate violation of self." It is also a violent crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. (Footnotes and authorities omitted.)

Within the criminal justice process, the peculiar evil of sexual assault is its dual infliction upon the victim. At the occurrence she suffers grave physical and emotional abuse. Thereafter, in the course of prosecution, she suffers additionally. Students of her experience have reported that the prosecutorial process "precipitates as much of a psychological crisis as the rape itself;"[30] that complainants frequently regard "their encounters with the police, district attorneys, and courtroom personnel [as] more traumatic than the rape incident itself;"[31]

(1975); O'Neale, *Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution — Or How Many Times Must a Woman Be Raped*, 18 Santa Clara L. Rev. 119 (1978); Sutherland & Scherl, *Crisis Intervention with Victims of Rape*, appearing as c. 16 in *Forcible Rape* (D. Chappell, R. Geis & G. Geis eds. 1977); and Note, *The Victim in a Forcible Rape Case: A Feminist View*, 11 Am. Crim. L. Rev. 335, 347 (1973).

[29] A. Burgess & A. Lazlo, *When the Prosecutrix is a Child: The Victim Consultant in Cases of Sexual Assault*, in *Victims and Society* (E. Viano ed. 1976); Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977 (1969).

[30] L.L. Holmstrom & A.W. Burgess, *The Victims of Rape: Institutional Reactions* 229 (1975).

[31] Bohmer, *Judicial Attitudes Toward Rape Victims*, *supra* n.28 at 161.

and that the victim emerges with a sensation of rape by both the defendant and the criminal justice system.[32]

These conclusions draw support from the perspective and experience of the willing complainant. Initially she bears a culturally rooted, though irrational, sense of shame, guilt, and defilement.[33] As a result, "notoriety and publicity present a spectre of horror to most rape victims. The necessity for discussing intimate and personal details of even an abusive and forcible occurrence are loathsome."[34] Victims strong enough to control such feelings must then engage "the quite objective and rational apprehension of what lies before them in the ordeal" of a criminal prosecution.[35] The process as a whole often goes unexplained as a succession of disjointed trips to the police station, the district attorney's office, and the courthouse.[36] The visits are often repetitive; interrogations, interviews, and identification procedures require the victim to recount and to relive the assault. They will be anxiety-ridden and seemingly fruitless.[37] The victim will undergo the most intimate medical examination by a physician other than her own.[38] In particular, trial continuances will frustrate her preparation, protract her fears, and test her endurance.[39] A

---

[32] J. Bode, *Fighting Back*, c. 7 (1978); L.L. Holmstrom & A.W. Burgess, *supra* n.30 at 235-236.

[33] B.A. Morosco, *supra* n.28, at § 1.03[b]; Sutherland & Scherl, *supra* n.28 at 336-337.

[34] B.A. Morosco, *supra* n.28 at § 1.03[b].

[35] *Id.*

[36] *LEAA Report*, Chapter VIII; Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 Judicature 391-393 (1975).

[37] Bohmer & Blumberg, *supra* n.28.

[38] B.A. Morosco, *supra* n.28 at § 1.03[b].

[39] B.A. Morosco, *supra* n.28 at § 1.03[b]; Bohmer & Blumberg, *supra* n.28. The latter authors point out that a victim changing her mind about

lack of personal representation and a related sense of isolation will run throughout the process: the victim will proceed through a gauntlet of police officers, prosecutors, medical personnel, and judges who must with reasonable detachment satisfy standards of corroboration and proof.[40] The prosecutor cannot function as the victim's personal attorney; she is his witness and vehicle of evidence toward a just conviction, but not his client; her evidence, and not her distress, is his paramount concern.[41] The onset of trial may bring a lost sense of time flow, the fear of a public performance, apprehension over possible betrayal or desertion by police and prosecution, and more generalized worry over the possibility of retaliation against her.[42] The hearing and trial stages themselves will expose her to cross-examination, often skillful, vigorous, and accusatory upon the subjects of consent and sexual history.[43] Amid her shame from the event and dread of the trial, the victim may understandably choose not to press a complaint, or may eventually break off her cooperation or lose her ability to testify effectively.

---

prosecution "may simply have had enough of the legal system or [come to feel] that she is not psychologically strong enough to undergo continued contact with the authorities . . . ."

[40] B.A. Morosco, *supra* n.28 at § 1.03[b]; Bohmer & Blumberg, *supra* n.28.

[41] B.A. Morosco, *supra* n.28 at § 4.02(c); Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 84-87 (1977). As these authors point out, a prosecutor may even tolerate some degree of abusive cross-examination of the victim in order to gain the sympathy of the jury.

[42] L.L. Holmstrom & A.W. Burgess, *supra* n.30 at 229-236 (1975).

[43] The tendency of the trial to cast the victim as the defendant has been the subject of considerable literature and of victim shield law reform. See especially Tanford & Bocchino, *Rape Victims, Shield Laws, and the Sixth Amendment*, 128 W. Pa. L. Rev. 544, 546-551 (1980); Berger, *supra* n.41 at 12-39; Bohmer & Blumberg, *supra* n.28 at 392-393; and *Note, Recent Statutory Developments in the Definition of Forcible Rape*, 61 Va. L. Rev. 1500, 1503-1516 (1975).

The experience will be all the more traumatic for a child. Psychiatrists concur that the youthful victim's psychic trauma depends as much, or more, upon her treatment after the offense as upon the event itself.[44] Two-thirds of juvenile victims suffer short-term psychological effects commonly including withdrawal, anxiety, enuresis, guilt, school problems, delinquent or antisocial behavior, and lack of self-esteem.[45] Evidence suggests that victims participating in judicial proceedings suffer more psychic harm than those who do not.[46] Children are especially disturbed by the experience of confrontation and cross-examination in a public setting.[47] The open setting will be particularly intimidating to the victim of sexual child abuse when she will suffer the ambivalence of exposing and testifying against an acquaintance or family member.[48]

In these circumstances the frequency of forcible rape has increased sharply in recent years while the offense has remained the most underreported of all serious crimes against the person.[49] Its incidence in 1979 rose by 13 percent over that of

---

[44] Libai, *supra* n.28 at 980-981; See E. Hilberman, *supra* n.28 at 53.

[45] S. Katz and M. Mazur, *supra* n.28 at 234-237.

[46] *Id.* at 200.

[47] L.L. Holmstrom and A.W. Burgess, *supra* n.30 at 222; Libai, *supra* n.29 at 1021. See also E. Hilberman, *supra* n.28 at 53; and S. Katz and M. Mazur, *supra* n.28 at 199-200, 233-236.

[48] J. MacDonald, *supra* n.32 at 128-129 (1971). Data indicate that the child incurs greater emotional harm from testimony against a known person than from that against a stranger. *Id.*

Also, evidence supports the conclusion that children suffer more assaults from known persons than strangers and that these assaults are more damaging and far less reported than those by strangers, especially in circumstances of repetitive sexual child abuse. S. Katz & M. Mazur, *supra* n.28 at 246 (1979).

[49] See, to the same effect, Berger, *supra* n.41 at 1, 5 & nn. 26-29; Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 Va. L. Rev. 1500 & nn.2-4.

1978 and by 35 percent over the 1975 figure. United States Department of Justice, Federal Bureau of Investigation, *Crime in the United States*, 13-14 (Annual Report released September 24, 1980). Yet "[f]orcible rape, a violent crime against the person, has been recognized by law enforcement as one of the most under-reported of all [FBI] Index crimes, primarily because of victims' fear of their assailants and their embarrassment over the incidents." *Id.* It is estimated that the actual number of rapes is three-and-one-half times greater than the number reported, a larger disparity than for any other crime. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 21-22 (1967). This circumstance has long been prevalent.[50] In the cases of minor victims, many parents foresee the grueling quality of the criminal process and decline to report sexual assaults in order to shield their children from public trauma; as many as one-third of those parents reporting sexual assaults subsequently express dissatisfaction with their treatment by authorities.[51]

Against these obstacles, the Massachusetts closure law encourages young victims and their families to come forward and assist in the prosecution of a painful and peculiarly undetected category of crime. It assures the victim and her family of her shelter from the trauma of public testimony at trial. The mandatory quality of the law eliminates with certainty a central fear of the victim from her first contact with the police and prosecutor. In the longer view, "the statute helps obtain just convictions for the types of crimes from which the victims had often suffered at the hands of the criminal justice system, while their assailants had often gone free" (J.A. 74a).

---

[50] J. MacDonald, *supra* n.28 at 128 (1971).

[51] See J. MacDonald, *supra* n.28 at 128; and S. Katz and M. Mazur, *supra* n.28 at 193.

C. *The Closure Statute Serves the Identified State Interests Effectively; It Does Not Overbroadly or Unnecessarily Restrict Trial Publicity.*

Against the weight of empirical opinion, the Globe and various Amici contend that mandatory closure of a youthful victim's testimony does not effectively serve the overriding state interests specified by the Supreme Judicial Court and that it therefore unnecessarily curtails press access to her court appearance (Globe Brief at 31-40; Brief of the ABC Amici at 19-26; and Brief of the Amicus Reporters Committee at 12-16). Alternatively, they propose that the Commonwealth could achieve the same objectives through a less drastic system of case-by-case adjudications of each juvenile victim's capacity to give effective testimony (Globe Brief at 14-23; Brief of the ABC Amici at 17-18; Brief of the Miami Herald Amici at 9-10, 14-15; Brief of the Amicus Reporters Committee at 19-24). We address those arguments in turn.

1. The Statute Effectively Promotes Its Purposes.

The Globe and the Amici cite little judicial or empirical authority to negate the proposition that the prospect and experience of trial testimony will prove traumatic for a youthful victim and deter or inhibit her effective appearance at trial.[52]

---

[52] The Globe attempts to palliate the empirical literature by reference to particularly traumatic components of the victim's trial experience, such as the process of cross-examination and the probe of her sexual history; or by reference to other contributory causes of the child's trauma, such as family conditions and the violence of her assault. Brief at 34-36 & nn.19-22. However, as the cited works make clear, those factors add to the trauma of publicity. They do not comprise a substitute cause of it. Similarly, with regard to suggested alternative remedies such as rape counseling and packing the courtroom with victim supporters, *id.* at nn.19, 23, no author characterizes such worthwhile efforts as an adequate cure for the inevitable distress of public examination and cross-examination.

Rather they challenge that thesis upon the circumstances of the three victims in the present underlying trial and upon a general skepticism as to each of the statutory concerns particularized by the court below. Neither approach is persuasive.

The press's reliance upon the facts of the immediate case as a general refutation of the law's utility constitutes a particularly weak prop for a facial attack upon the closure statute. The Globe and Amici contend that the three victims came forward, expressed a willingness to waive closure, and persisted through the trial without regard to the protection of the statute.[53] The record reveals a materially different story. The three girls, aged 17, 16, and 16 at the time of trial, and approaching the upper limit of the statutory coverage (a victim less than 18 years old) had been awaiting trial in the courthouse for eight days, had undergone extensive pretrial testimony and cross-examination, and had reached "an extremely high level of anxiety and emotional stress" (J.A. 28a). They enjoyed no independent representation from counsel or a guardian ad litem but instead were taking their consultation about closure from the prosecutor. *Id.* The prosecutor, meanwhile, in anticipation of the accused's appeal upon a Sixth Amendment objection to closure, was eager to waive the statute in behalf of the government and the victims (J.A. 18a, 28a, 42a).[54] After both the trial judge, J.A. 17a-18a, and the single justice, J.A. 41a-42a, had rejected the offer of waiver in light of the statute's mandatory terms, the victims themselves — still prior to the empanelment of the jury — sought from the

---

[53] See n.2 *supra*. See especially the Globe Brief at 32; the Brief of the ABC Amici at 19, 21, 22; the Brief of the Miami Herald Amici at 8, 12; and the Brief of the Amicus Reporters Committee at 15.

[54] Since the prosecutor probably viewed the statutory closure to cover the entire trial, his Sixth Amendment concern was understandably far more substantial than it would be for the temporary closure of the victim's testimony only, as spelled out in *Globe I* (J.A. at 66a-68a, 74a-77a).

trial judge as a condition of press attendance a "guarantee" that any media personnel would not in any way identify them by name or personal data (J.A. 48a). The trial judge, of course, could not constitutionally have extended or enforced any such arrangement in the nature of a prior restraint. *Oklahoma Publishing Co.* v. *District Court of Oklahoma County*, 430 U.S. 308 (1977); *Smith* v. *Daily Publishing Co.*, 443 U.S. 97, 103-104 (1979); *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 556-562 (1976). He continued to apply the statute as mandatory and not permissive (J.A. 48a).

It is difficult to perceive how this series of events disproves the utility of the closure provision. Far more practically it tends to vindicate the statutory purposes. It shows that even relatively mature victims will need the benefit of some closure; that for voluntary and informed waiver such victims would require independent consultation with their own counsel or guardian ad litem; that the district attorney facing a wider array of legal and tactical concerns cannot and probably should not assume the role of adviser in the best personal interest of the victim;[55] that even a resilient victim will experience understandable turns of mind as tension mounts during proceedings approaching trial; that the resolution of the competency and wisdom of a waiver decision would require a substantial independent hearing for the trial judge's investigation into its underlying voluntariness and intelligence and his inquiry into its effect upon the child's welfare and the quality of her testimony (a hearing, then, involving the participation of the victim, her representative, probably some expert evidence, the prosecutor, the defense counsel and one or more press counsel); that the trial judge will not be able to control

---

[55] The commentators consistently emphasize the problem illustrated here. See, *e.g.*, Berger, *supra* n.41 at 84-87; and Bohmer and Blumberg, *supra* n.28 at 392-393.

the course of publicity resulting from the admission of selected press representatives as an alternative or least drastic measure; and that he would not be able to undo any damage to the child's emotions or to her evidence if she proved subsequently unable to testify competently in public. Far from demonstrating the ineffectuality of the law, the trial below illustrated the value of a limited but definite closure policy for even those victims most inclined to surrender its benefit.

The remainder of the attack upon the statutory objectives is a serial of doubt about each of the five interests identified by the Supreme Judicial Court (J.A. 101a; Globe Brief at 32-40; Brief of the ABC Amici at 19-26; Brief of the Miami Herald Amici at 12-14; and Brief of the Amicus Reporters Committee at 12-17). In this branch of the argument the overall theme of the newspaper and the Amici is that each of the state concerns and the closure statute's promotion of them are speculative. This line of argument itself carries little reference to legal or empirical support.

As to the encouragement of victims to report, and to assist through the prosecution of, crimes of sexual assault, the Globe insists that privacy of testimony cannot work effectively because it does not assure the victim of general anonymity and because it leaves in the courtroom at the moment of testimony a number of unfamiliar personnel including the jury, court officers, counsel, and the defendant and his family or friends (Globe Brief at 31-33). This contention misstates the statutory purpose. The statute does not purport to confer hermetic privacy upon the victim at all times after the crime both within and without the courtroom. More realistically it extends within the trial a reasonable enclave from trauma. At all pretrial stages, it alleviates the victim's foreboding of the moment of testimony. With regard to the personnel remaining in the courtroom, their number and atmosphere differ materially from a crowded gallery typically drawn to such

trials and from a full press section of reporters and sketch artists writing simultaneously with the child's testimony. For the most part, the remaining participants are situated within the bar enclosure and subject to the immediate management of the presiding judge. In these circumstances the judge is far more able to furnish a setting of quiet and security for the witness than in the presence of a packed and active audience. Open and closed testimony comprise two distinct physical realities.[56]

Concerning the protection of juvenile victims from public degradation, humiliation, demoralization, and psychological damage, the press contends that a minor should rationally distinguish between the stigma of publicity accorded a juvenile delinquent or criminal and the neutral or supportive attention focused upon her as a victim. It suggests that she should appreciate the trial of her assailant as a "purifying process" in her behalf (Globe Brief at 36-38) or as a "therapeutic" or "cathartic" experience for the benefit of "long-range emotional health." (Brief of the Miami Herald Amici at 12-13; to the same effect, Brief of the Amicus Reporters Committee at 13-14).[57]

These observations might be true for the responsible segments of the press and the community; however, they are too

---

[56] On this point, the Miami Herald Amici (Brief at 12) and the Amicus Reporters Committee (Brief at 12-13) hypothesize that open testimony should ideally stimulate, rather than inhibit, victim cooperation. The Commonwealth does not quarrel with the ideal. The statute, however, must deal with the cultural realities described by the authorities discussed above and reflected in the common experience of the population.

[57] Indeed the Miami Herald Amici at one point argue that the statute overpaternalistically deprives minors of rights of free expression and tends to validate their irrational feelings of shame (Brief at 19-21).

More realistically, the ABC Amici concede the problem of embarrassment and inhibition but would simply subordinate that concern to the interest of publicity (Brief at 8).

subtle to be practicable for the needs of the child. When the child confronts the glare of attention, she cannot feasibly be expected to distinguish between empathy and prurient curiosity, between the rational and the irrational segments of the audience, or between the brand of the wrongdoer and that of the victim. By analogy, the law of libel does not expect such careful distinctions from an injured party, regardless of age. It determines a person as wronged whenever communication would tend to discredit her, not in the minds of a reasonable, tolerant, or thoughtful public, but in the minds of a community containing the usual run of emotional, intolerant, and prejudicial constituents.[58]

Similarly, here the child suffers from exposure regardless of the quality of the audience. Publicity per se intimidates her from the process of prosecution and inhibits her necessary courtroom appearance. The statute realistically anticipates these problems of stigma and embarrassment. It cannot discount them upon grounds of their ultimate irrationality, but must deal with them as serious obstacles in the path of the victim through the criminal justice process.

With regard to the enhancement of credible testimony from minors free of confusion, fright or embellishment, the Globe would rely upon cross-examination for reliable information (Brief at 38),[59] the Miami Herald Amici upon the sobering

---

[58] See, *e.g.*, *Peck* v. *Chicago Tribune*, 214 U.S. 185, 189-190 (1909) (Holmes, J.); *Grant* v. *Readers Digest*, 151 F.2d 733, 735 (2d Cir. 1945) L. Hand, J.); *Restatement of the Law of Torts Second* § 559, Comment e (1977); 1 F.V. Harper and F. James, *The Law of Torts* § 5.1 (1956).

[59] Simultaneously the Globe concedes:

> The prospect of being subject to cross-examination by the defense attorney is an almost universally cited source of anxiety on the part of rape victims. The tradition of stringent cross-examination by defense attorneys and rape victims' consequent fear of the legal process have in fact been a major impetus in the enactment of virtually all states of rape victim shield laws. (Brief at 36 n.21, citations omitted).

atmosphere of the open courtroom (Brief at 13), and the Reporters Committee upon the merely incremental impact of several attending reporters (Brief at 15). The first two assertions miss the point that the child may not be able to testify effectively at all or may already have withdrawn for lack of assurance of privacy. Also, it would seem far more plausible that the lower-pitched atmosphere at closure would release a minor from a self-consciously public posture and promote more reliable testimony. The press's latter point slights the likelihood that the active presence of working reporters and their known ability to transcribe and publish her words almost simultaneously will tend to break the mood of privacy and unnerve the victim.[60]

As to the sound and orderly administration of justice, The Globe and the Amici insist that secrecy per se violates such a concept (Globe Brief at 38-39; Brief of Miami Herald Amici at 13 and of the ABC Amici at 24, both referring to "secret trials"; Brief of the Amicus Reporters Committee at 16). This response

---

[60] See Bohmer and Blumberg, *supra* n.28 at 391-395; Berger, *supra* n.41 at 92:

> But one particular type of observer could well disturb the victim greatly. Few would relish recounting intimate sexual events in the knowledge that not ten yards away a newspaperman or television reporter was scribbling down every last detail.

See the conclusion of the Supreme Judicial Court to the same effect in *Globe I*, J.A. at 77a:

> But the knowledge that those few extra persons were reporters who might publish her testimony to thousands would probably increase by orders of magnitude her sense of exposure, vulnerability, and alarm.

As the ABC Amici acknowledged (Brief at 23 n.75), the teenaged victims in the trial at hand were concerned with the publication of their identities (a factor beyond the control of the trial judge) by even a few attending reporters. (Contrary to the suggestion of those Amici, the victims did not appear, at the same time, to accept the attendance of the general public, but merely to condition the presence of press representatives).

begs, rather than analyzes, the question. The issue is whether the limited closure of a peculiarly vulnerable witness's testimony should proceed as a standing rule or whether on a case-by-case basis the trial judge should undertake a potentially cumbersome side-trial and its accompanying risk to the composure of the victim. In these circumstances the operation of a regular and intrinsically rational policy serves the sound and orderly administration of justice.

Finally, as to the preservation of evidence necessary for just convictions, the Globe defines closure as a per se injustice and hence a contradiction rather than a fulfillment of that objective (Brief at 39, referring to a "secret trial"; see also the Brief of the Amicus Reporters Committee at 16-17). This retort is again simply a conclusion rather than analysis of the concerns identified by the researchers and commentators and discussed by the Supreme Judicial Court in *Globe I* (J.A. 70a-74a). The press's dismissal of those interests is neither sustained nor rigorous. Rather the thrust of its argument is that the closure provision implements those goals, however worthy, overbroadly or with an unnecessary loss of publicity, and that closure could serve those purposes equally well on a discretionary basis of case-by-case adjudications.

2. The Statute Does Not Work Overbroadly; It Could Not Serve Its Purposes Equally Well as a Discretionary Policy.

The Globe and all Amici insist that Mass. G.L. c. 278, § 16A could just as effectively accomplish its objectives through a system of particularized determinations of the young victim's need for closure. That argument is unconvincing if less drastic alternatives mean devices less severe but nonetheless effective of a legitimate statutory end. The press's revision of the Massachusetts juvenile closure process would defeat its present utility.

The major practical feature of the statute is its assurance, not its possibility, of some protection for the young victim.

In order to bring and to keep the juvenile complainant forward in the criminal process, the prosecutor is able to inform the victim and her family from the first contact that the court will shelter her from a crowded audience and from the press at the moment of testimony and confrontation. Otherwise, "the families of youthful victims will be uncertain whether the reporting of a sexual assault will expose a child to additional trauma caused by the preliminary hearing as well as to public testimony at trial" (*Globe II*, J.A. at 102a).[61]

Further, the value of the system of particularized adjudications proposed by the press is extremely doubtful. To this point the Globe has been noncommital about the process and content of such hearings. Possibly it would wish to attend and to inquire into the psychological vulnerability of the child (see *Globe II*, J.A. at 102a n.15). More explicitly, the Miami Herald Amici envision a hearing at which the trial court weighs the age and maturity of the witness, the nature of her testimony, the importance of her testimony to the case, and her emotional susceptibility (Brief at 14). Supposedly, the victim herself need only testify to her desire for closure. She would then have to offer supporting expert testimony. Opposing

---

[61] In the same vein, the Globe and Amici argue that the mandatory quality of Mass. G.L. c. 278, § 16A must be unnecessarily broad because most other states maintain only permissive statutes (Globe Brief at 24-27 & nn.13-16; Brief of the ABC Amici at 24-25 & nn.78-80; Brief of the Miami Herald Amici at 21-23 & n.8). (In fact two states do mandatorily exclude the public from entire trials: Iowa Code § 675.20 (1971) (barring the general public from paternity trials); W. Va. Code § 48-2-23 (1966) (requiring the trial of divorce suits in chambers).)

The logic of that argument is hardly cogent. One might equally well posit that the drastic rate of unreported sexual assaults continues in part from the general failure of states to extend mandatory support to victimized children. See, *e.g.*, United States Department of Justice, Federal Bureau of Investigation, *Crime in the United States* 13-14 (Annual Report released September 24, 1980) and President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 21-22 (1967).

actors, apparently the press and possibly the defendant, would offer "countervailing proof" (*id.* at 16).

This procedure would seem to draw the press across the line between a trial observer and a trial participant. In addition to such an invasion, the exercise seems inevitably cumbersome, stressful to the child, and inherently unlikely to disprove the value of closure. In the great majority of cases, the child and her family will want the benefit of the statute. At the hearing an attorney or guardian ad litem will be necessary for her independent representation. Prosecutor, defense counsel, press counsel, and perhaps expert witnesses will attend. The child will express a desire for a closed setting, perhaps the most probative evidence of her need. For if the child is subjectively convinced of her need, the contrary view of experts and a denial of closure could not prevent her likely distress and the risk of impairment to her testimony.

Other questions remain about the hearing process. Beyond her request for closure, should the child undergo direct and cross examination by the variety of interested parties? Should the hearing include a contest of expert opinions? Would the expert opinions rest upon a prior examination or contemporaneous observation of the child, either of which again focuses attention upon her? Moreover, the legal arguments of the parties would seem to be standardized and would not seem to require special hearings in behalf of the child (closure), the defendant (claim or waiver of Sixth Amendment right) or the press (claim of open testimony or the presence of representative reporters as the least restrictive alternative). The trial judge would typically inform the child and her family that he could not restrain the publication of any information acquired by reporters permitted at her testimony.

In the exceptional case of the juvenile inclined to waive closure, the trial judge would still have to inquire into the validity and wisdom of the choice. The purpose of the trial

remains accurate factfinding through reliable evidence. The victim's capacity for recollection and narration toward effective and honest testimony is the trial court's overriding concern, and not the desire of the child or her family to publicize the heinousness of the crime upon her. Similarly, the wishes of the complainant do not govern the course of the prosecutor bound to pursue a just conviction in his independent best judgment.[62] The prosecutor may oppose waiver on the ground that the witness would be unfairly risking the quality of the government's evidence for extrinsic motives of publicity. He may feel that she is incapable of a competent public appearance or that her performance will unfairly sacrifice her credibility with the jury. Even in the anomalous case, then, a hearing of similar scope and character would be necessary for a determination of the soundness of a waiver by a juvenile. If the judge allowed the waiver and if the child subsequently failed to testify effectively, the impact upon the case and upon her would be difficult, if at all possible, to remedy. In these circumstances the state, as the court below concluded, is entitled to preempt such risks and to protect the welfare of the child as *parens patriae*, to safeguard the quality of the trial, and to foreclose such potentially unwieldy, marginally valuable, and perhaps even self-defeating hearing procedures.[63] See especially *Ginsberg* v. *New York*, 390 U.S. 631,

---

[62] *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973) and cases cited; *Berger* v. *United States*, 295 U.S. 78, 88 (1935); 1 *Wharton's Criminal Law* § 75 (14th ed. 1978, C.E. Torica).

[63] The press's ultimate objection to the prohibition of a juvenile's waiver is that the state should not constitutionally wield the paternalistic authority to protect the minor from herself when such protection interrupts trial publicity (Globe Brief at 31-39; Brief of the ABC Amici at 21-23; Brief of the Miami Herald Amici at 18-21). Yet such paternalistic power is well established, most commonly in the juvenile justice system. Similarly, the state does not traditionally defer to the juvenile's notion of her best interest on many fronts when experience or contrary objectives dictate otherwise. By definition the

638, 640 (1968) (the state's interest in the well-being of its youth authorizes a relaxed definition of obscenity for minors); and *Prince* v. *Massachusetts*, 321 U.S. 158, 166-167, 170 (1944) (neither a child nor her guardian may waive the benefit of the state's child labor laws even in order to engage willingly and sincerely in the free exercise of religious beliefs by the sale of tracts in city streets), for the strength of the state's concern as *parens patriae* even against acknowledged First Amendment claims and the child's apparent waiver of the state's protection.

A final premise of the press's insistence upon case-by-case adjudications is the disqualification of legislative judgment about the closure of juvenile testimony in the criminal justice system. The Globe and Amici maintain that a state legislature may only authorize trial judges to close testimony but may not categorically prescribe closure for a defined body of evidence. Undoubtedly, as a matter of common law, trial judges have always possessed inherent discretionary authority to close all or parts of trials upon appropriate findings and reasoning.[64] Consequently the delegation of such authority from the legislature conveys no genuine additional power upon the subject. According to the media, the legislature, in effect, is powerless to act upon closure beyond the traditional common law limits.

Yet the welfare of minors has long been a fundamental subject of state legislative action. The Massachusetts closure law exemplifies conscious treatment of the dilemma of juvenile

---

role of *parens patriae* will forbid even the mature minor many wishes, such as driving, drinking, or early retirement from school. Here, also, as we have mentioned, the state maintains an additional concern in the effective presentation of her evidence and a conviction for a crime committed against the community of which she is a member.

[64] See *Gannett* v. *DePasquale*, 443 U.S. at 388 n.19 (plurality opinion); *id.* at 398 (concurring opinion of Powell, J.); *Richmond Newspapers*, 448 U.S. at 581-582 n.18 (plurality opinion); *id.* at 600 (opinion of Stewart, J.).

victims. In its original 1923 version, the statute merely authorized a superior court judge but commanded a district (local or municipal) court judge to exclude the public. After eight years experience with this dual system, the legislature, at the recommendation of a special commission reviewing the general laws concerning the status of children, enacted the present uniformly mandatory language (*Globe I*, J.A. at 70a-71a, 74a-76a). Returning to the subject of closure for the benefit of adult victims of sexual assault, the legislature in 1978 authorized the closing of the whole or part of a trial, but only upon the prosecution's request and the accused's consent.[65] While it drafted a calibrated law for adult victims, it left intact the mandatory safeguard for minors (J.A. 74a & n.21). Consequently, the present law reflects a considered and well established judgment from which the Globe would constitutionally oust state legislatures.

Such a constitutional imperative attributed to *Richmond Newspapers* seems all the more unlikely in light of the traditional legislative competence to address through its factfinding resources matters of juvenile welfare and justice and the operating rules of tribunals serving them. See *McKeiver* v. *Pennsylvania*, 403 U.S. 545-550 (1971) (state legislatures for sound policy reasons may deny a minor a right to a public jury trial in their juvenile justice systems). As recently as *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 496 (1975), the

---

[65] Mass. G.L. c. 278, § 16C, provides:

> To protect the parties involved at a trial arising from a complaint or indictment for incest or rape, the trial judge may exclude all spectators from the courtroom in which such trial is being held, or from said courtroom during those portions of such trial when direct testimony is to be presented; provided, that either of the parties requests that all spectators be so excluded at the trial or portions thereof; and provided further, that the defendant in such trial by a written statement waives his right to a public trial for those portions from which spectators are so excluded.

Court adverted to a legislative role in similar circumstances: "If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interest of the public to know and of the press to publish." Indeed, legislatures may reasonably regulate even direct expression for sound reasons and within well drawn boundaries. See, *e.g.*, *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (prohibition of sound amplifiers in public places); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573-574 (1942) (punishing provocative or "fighting" words); and *Cox* v. *New Hampshire*, 312 U.S. 569, 575-576 (1941) (regulating expressive parades or processions in public streets by a system of licenses and fines). Here too the legislative judgment carries sharp demarcations: closure is confined to the testimony of a victim under eighteen and to a crime of sexual assault.[66] These are limits of quality, not of degree.[67] They are uniform, definite, and inelastic against the threat of additional or unnecessary closure.

---

[66] The Supreme Judicial Court limited the holding of *Globe II* to the crimes of forcible and forcible unnatural rape (J.A. at 98a & n.11). In light of its strict construction of the closure statute in *Globe I* as a provision derogating from the common law principle of publicity and raising constitutional questions, the court would not likely view any "other crime involving sex" as an offense less than assaultive behavior. The canon of *eiusdem generis* would lead to the same conclusion. Such "other crimes" mean those of the nature of rape, incest and carnal abuse. The Globe's suggestion of the easy extension of this catalogue of offenses is not well founded (Brief at 33 n.18). Since the crime of the present case is lodged in the core of the statute, the plaintiff cannot attack its constitutionality through hypothetical problems at its periphery. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 608 (1973) and cases cited.

[67] The ABC Amici express perhaps the press's ultimate fear that, apart from the present case, "other blanket exclusions of the press might be found to be similarly permissible" (Brief at 9).

Finally, legislative innovation and experiment remain valuable in the field. Four states have authorized trial judges to order the videotaping of the entire testimony of minor witnesses in chambers in lieu of direct appearances before the jury.[68] This procedure will serve the interests of the child and of reliable evidence. With emphasis upon the vulnerability of the young victim, one author has now proposed a model act embodying such an innovation. See Parker, *The Rights of Child Witnesses: Is The Court a Protector Or Perpetrator?* 17 New England L. Rev. No. 3 (1982). Certainly *Richmond Newspapers* does not disable such continuing legislative efforts.

D. *The Closure Statute Does Not Restrict the Flow of Information Necessary to the Operation of Democratic Institutions.*

With attention to the analysis of Mr. Justice Brennan in the *Richmond Newspapers* decision,[69] the court below concluded that the closure of the young victim's testimony did not constitute an interruption of information harmful to democratic processes of self government (J.A. at 98a, 100a-101a). That

---

[68] See Ariz. Rev. Stat. Ann. § 12-2312; Fla. Stat. Ann. § 918.7 (West Supp. 1980); Mont. Rev. Code Ann. § 46-15-401; and N.M. Stat. Ann. § 30-9-17.

In another statutory movement, both the Congress and the legislatures of 30 states have within the past decade enacted rape victim shield laws barring or restricting the introduction of evidence of the victim's sexual history or reputation. See The Privacy Protection for Rape Victims Act of 1978, Pub. L. No. 95-540, 92 Stat. 2046 (1978) codified as Fed. R. Evid. 412. For a classification of the state shield legislation, see Tanford and Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544, 596-602 (1980).

[69] 448 U.S. at 584-598 (concurring opinion joined by Justice Marshall).

conclusion draws force from several sources.[70] Most obviously the present law is closing not the entire conduct of a trial but rather the testimony of a distinct and vulnerable witness. This difference of scale is important to the quantity and quality of press and public access when one remembers the social utility of openness: public supervision of the performance of the participants in the system of justice, including judges, jurors, all counsel, and the police; the deterrence of perjury and the possible attraction of unknown witnesses or other evidence; public education and confidence in, and improvement of, the judicial process; the promotion of the deterrent and retributive purposes of criminal law; and the public's cathartic observation of, or participation in, the criminal justice process. When a court cordons off the entire trial, it forecloses all such benefits. When it gives momentary privacy to specific testimony only (and for important countervailing policies), it does commensurately less harm to the values of openness.

Still, the press contends that the testimony of the young victim is singularly crucial because of its incriminating capacity (Globe Brief at 28; Brief of the Miami Herald Amici at 10) and because of its relevance to the subjects of prosecutorial judgment, victims' treatment, evidentiary policies, and appropriate sentencing (Brief of the ABC Amici at 12-14). To be sure, these subjects warrant public attention, but the testimony of the victimized child is not the public's sole line of sight into them. The typical trial will include five classes of testimony in addition to that of the child, all open to public inspection: police testimony, medical and scientific testimony, corroborative witness testimony, defendant testimony, and defense corroboration or alibi testimony. See B.A. Morosco, *The Prosecution and Defense of Sex Crimes* § 4.02[4] and [5]

---

[70] One is the English and American willingness to except such testimony from the general principle of publicity, as recounted in Part IIIA above.

(1978). It will embrace the summation of counsel and instructions of the judge. These aggregate sources will typically shape a coherent picture of the case.[71]

In addition, the transcript of the minor's testimony will be available, at the sound discretion of the trial judge, to the newspaper or broadcaster viewing it as essential to its trial coverage (*Globe II*, at 101a n.14). For public education in the criminal justice process, the transcript should furnish another source of instruction. For the transmission of demeanor evidence or drama, no doubt the press will always find it disappointing. In the present circumstances, however, the transcript is not functioning as substitute for, but more closely as a supplement to, trial attendance.[72]

In a consideration of possible injury to the flow of public information, the somewhat ironic comparison between the privacy afforded the juvenile offender and that at stake for the juvenile victim acquires constitutional significance. Both the trial judge (J.A. 17a) and the Supreme Judicial Court (*Globe II*, J.A. 104a) sensed the incongruity of a doctrine conferring privacy upon the delinquent but withholding it from the victim. If both are minors, the same strong considerations favor-

---

[71] Criminal trial practice inevitably includes practical accommodations between public and private procedures even though the entire subject relates to the public interest. Thus, every side-bar conference about an important offer of proof, every chambers conference between judge and counsel, and every plea bargaining session in the prosecutor's office or courthouse corridor should ideally be open to public observation. Because such publicity would be impracticable or harmful to other social benefits (including often the interest of efficiency in the criminal process), those moments are constitutionally tolerable as private.

[72] In *Gannett*, the plurality considered the availability of a transcript as an ameliorative to closure of pretrial hearings. 443 U.S. at 393. Mr. Justice Blackmun, *id.* at 442 n.17, and Mr. Justice Brennan in *Richmond Newspapers*, 448 U.S. at 597 n.22, noted the transcript's limitations as a remedy for total closure of a proceeding.

ing confidentiality should be at work: privacy will shield the juvenile from public identification, stigma, and a diminished self-esteem, and will facilitate a clean start and rehabilitation.[73] *In re Gault*, 387 U.S. 1, 24-25 (1967). Indeed, society would seem to have a stronger claim to knowledge of the delinquent and the management of him as a threat, and often a recidivist threat, to its security than it would have in the identity and experience of the one-time juvenile victim. Nevertheless, the Court has found the state's interest in the delinquent's privacy dominant over his claim to a jury trial and its resemblance to a public proceeding. *McKeiver* v. *Pennsylvania*, 403 U.S. 528, 549-550 (1971). The few exceptions to the delinquent's privacy have been concessions to specific competing constitutional rights and not to the general claim for increased publicity on behalf of the press. See *Davis* v. *Alaska*, 415 U.S. 308, 319-320 (1974) (criminal defendant's overriding right to confrontation and cross-examination of juvenile prosecution witness) and *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 108-110 (1979) (concurring opinion of Rehnquist, J.). If the state may constitutionally impose privacy upon the wrongdoer over his objection and for his best interest, it would seem constitutionally capable of the same policy in behalf of even the resisting juvenile victim again as a matter of her own best interest.[74]

---

[73] See S.M. Davis, *Rights of Juveniles* Chapter 1 (2d ed. 1981); E. Eldefonso, *Law Enforcement and the Youthful Offender* 166 (3d ed. 1978); Geis, *Publicity and Juvenile Court Proceedings*, 30 Rocky Mt. L. Rev. 101, 102, 116 (1958).

See also B.A. Morosco, *supra* n.28 at § 4.03[1]: "It is anomalous that a minor child who has committed a crime is protected from adverse publicity, while the minor child who is a victim of one is not."

[74] Conversely, if in this case the Court were to conclude that the First Amendment required public inspection of the fortuitous minor victim of a crime, the Amendment *a fortiori* would seem to entitle the press and public to similar knowledge of the inherently more newsworthy juvenile offender. The ABC Amici acknowledge this tension and augur a First Amendment

Finally, nothing in the challenged statute interferes with extrajudicial publicity. For the hypothetical juvenile victim or family intent upon the publication of her or their experience both in the offense and in the criminal justice process, all usual channels of communication with the media and public remain open.

Conclusion.

For the foregoing reasons the Court should affirm the judgment that Massachusetts' mandatory closure of the testimony of juvenile victims of sexual assault does not offend the rights

---

challenge to the traditional confidentiality of juvenile justice proceedings (Brief at 22-23 n.71).

The Globe and Amici collect a number of post-*Richmond* lower court decisions in support of the case-by-case application of closure orders (Globe Brief at 22 n.12; Brief of the ABC Amici at 17-18 n.52 and 26 n.83; Brief of the Miami Herald Amici at 27 n.18). Of the aggregate 15 decisions cited, none involved a mandatory statute; only two pitted the press's right of attendance against a minor victim's wish for closure: *State* v. *Sinclair*, 274 S.E.2d 411 (S.C. 1981) (upholding closure); *Connecticut* v. *Sheppard*, 7 Med. L. Rep. 1140, _____ Conn. _____ (1981) (reversing closure on Sixth Amendment grounds).

Several additional decisions involving juvenile victims include *North Carolina* v. *Burney*, 7 Med. L. Rep. 1411, _____ N.C. _____ (1981) (sustaining closure of victim's testimony); *Lexington Herald Leader* v. *Tackett*, 6 Med. L. Rep. 1436, _____ S.E.2d _____ (Ky. 1980) (rejecting closure); *Connecticut* v. *Frazier*, 7 Med. L. Rep. 1854, _____ Conn. _____ (1981) (upholding closure); *Connecticut* v. *McCloud*, 6 Med. L. Rep. 1613 (Conn. Super. Ct. 1981) (ordering closure); and *New York* v. *Jones*, 7 Med. L. Rep. 2096 (N.Y. Sup. Ct. App. Div. 1981) (sustaining closure). The trend of the latter decisions is that, even as a discretionary decision, the generic vulnerability of the juvenile victim will typically call for closure.

of the press and public to criminal trial attendance under the First, Sixth and Fourteenth Amendments of the Constitution.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
MITCHELL J. SIKORA, JR.,
GERALD J. CARUSO,
ALAN B. SHERR,
Assistant Attorneys General,
2019 McCormack Building,
One Ashburton Place,
Boston, Massachusetts 02108.
(617) 727-1038
Counsel for the Appellee

Appellant's Reply Brief

2

Supreme Court, U.S.
FILED
MAR 19 1982
ALEXANDER L. STEVAS
CLERK

No. 81-611

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

REPLY BRIEF OF APPELLANT

JAMES F. MCHUGH
MARC A. REARDON
JANE E. SERENE
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110.
(617) 357-9300
Counsel for Appellant

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Table of Contents.

I. There is no exception in English or American tradition which permits routine closure of a criminal trial on the basis of subject matter alone 2

II. A hearing prior to closure not only is necessary but also provides a workable mechanism for determining when, and to what extent, closure is truly appropriate 5

III. Appellant has standing to invoke the public trial guarantee of the Sixth Amendment on behalf of a defendant who opposed closure 11

Conclusion 16

Table of Authorities Cited.

Cases.

B. (otherwise P.) v. Attorney-General, [1965] 3 All E. R. 253, [1966] 2 W.L.R. 58 4, 4n

Baker v. Carr, 369 U.S. 186 (1962) 15

Barrows v. Jackson, 346 U.S. 249 (1953) 14

Carey v. Population Services International, 431 U.S. 678 (1977) 12

Carroll v. President & Comm'rs of Princess Anne, 393 U.S. 175 (1968) 9n, 10

Costarelli v. Commonwealth, 374 Mass. 677, 373 N.E.2d 1183 (1978) 13n

Craig v. Boren, 429 U.S. 190 (1976) 12, 14

DeFunis v. Odegaard, 416 U.S. 312 (1974) 16

Eisenstadt v. Baird, 405 U.S. 438 (1972) 12, 14
Flast v. Cohen, 392 U.S. 83 (1968) 15
Gannett Co. v. DePasquale, 443 U.S. 368 (1979) 15
Globe Newspaper Co. v. Superior Court, Mass. Adv. Sh. (1980) 485, 401 N.E.2d 360 (Globe I) 6n, 13n
Globe Newspaper Co. v. Superior Court, Mass. Adv. Sh. (1981) 1493, 423 N.E.2d 773 (Globe II) 2, 5, 6, 6n, 9 et seq.
Greenway v. Attorney-General, [1927] 44 W.L.R. 124 4
Hall v. Beals, 396 U.S. 45 (1969) 14
Havens Realty Corp. v. Coleman, 50 U.S.L.W. 4232 (February 24, 1982) 14
Liner v. Jafco, Inc., 375 U.S. 301 (1964) 14
Moore v. Ogilvie, 394 U.S. 814 (1969) 15
Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 5n
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 2, 6, 6n, 8n, 9 et seq.
Roe v. Wade, 410 U.S. 113 (1973) 16
Scott v. Scott, [1913] A.C. 417, [1911-13] All E. R. 1 2n, 4, 4n
Sibron v. New York, 392 U.S. 40 (1968) 14
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 14
Singleton v. Wulff, 428 U.S. 106 (1976) 12, 13
Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S 498 (1911) 15
United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) 14, 15
Warth v. Seldin, 422 U.S. 490 (1975) 14
Weinstein v. Bradford, 423 U.S. 147 (1975) 15

Whitmarsh v. Commonwealth, 366 Mass. 212, 316 N.E.2d 610 (1974) 13n

WXYZ, Inc. v. Hand, 658 F.2d 420 (6th Cir. 1981) 11

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution

Article III 13
First Amendment 5, 6n, 17
Sixth Amendment 8n, 11, 11n, 12, 17
Fourteenth Amendment 17

Massachusetts General Laws

ch. 119, §§ 1-39B 4n
ch. 210 4n
ch. 211, § 3 13n
ch. 278, § 16A 2, 3, 5, 5n, 6 et seq.

United States Supreme Court

Rule 34.4 1
Rule 35.3 1

Children Act (Punishment of Incest Act) of 1908, 8 Edw. 7, ch. 67, § 114 2n

Children and Young Persons Act of 1933, 23 Geo. 6, ch. 12, § 37 2n

MISCELLANEOUS.

A. Bickel, The Least Dangerous Branch (1962) 14n

L. Brodyaga, et al., Rape and Its Victims, A Report for Citizens, Health Facilities, and Criminal Justice Agencies (1975) 7

Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne St. L. Rev. 977 (1969) 8

J. Tanford & A. Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U. Pa. L. Rev. 544 (1980) 8n

No. 81-611

In the Supreme Court of the United States.

OCTOBER TERM, 1981

GLOBE NEWSPAPER COMPANY,
APPELLANT,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
APPELLEE.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR
THE COMMONWEALTH OF MASSACHUSETTS

REPLY BRIEF OF APPELLANT

Pursuant to Rules 34.4 and 35.3 of the Rules of this Court, appellant, Globe Newspaper Company (the "*Globe*"), files this brief in reply to the brief which the appellee, Superior Court for the County of Norfolk (the "Commonwealth"), filed with this Court on February 10, 1982. This reply brief is being filed one week before the case is called for hearing and chiefly responds to three points raised by the Commonwealth.

I. There is No Exception in English or American Tradition which Permits Routine Closure of a Criminal Trial on the Basis of Subject Matter Alone.

In Part III (A) of its brief, the Commonwealth argues that a "well-recognized exception to the principle of publicity," Brief of Appellee at 15, in both English and American tradition surrounds trials of crimes involving sexual assaults on minor victims. That "exception," in the Commonwealth's view, prevents a "mechanical extension," Brief of Appellee at 22, to such trials of the "presumption of openness" which this Court, in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 573 (1980), found inherent in the nature of criminal trials under our system of justice. *See also Globe II*, J.A. 98a. But the cases and other materials cited by the Commonwealth are perfectly consistent with that presumption of openness, a presumption so radically and inflexibly altered by M.G.L. ch. 278, § 16A.

To begin, with one exception,[1] the Commonwealth has been unable to cite any present or past statute from England or from any United States jurisdiction providing for mandatory closure of all or any part of a trial involving juvenile victims of

---

[1] The one exception is the Children Act (Punishment of Incest Act) of 1908, 8 Edw. 7, ch. 67, § 114, Brief of Appellee at 17, which required that all proceedings for the punishment of incest be held *in camera*. This act was repealed by the Children and Young Persons Act of 1933, 23 Geo. 6, ch. 12, § 37, which *permits* but does not require the court to exclude the general public during the testimony of a child or young person in any proceeding involving conduct contrary to decency or morality, "[p]rovided that nothing in this section shall authorise the exclusion of bona fide representatives of a newspaper or news agency." Moreover, as Lord Haldane noted in *Scott* v. *Scott*, [1913] A.C. 417, [1911-13] All E. R. 1, 10, enactment of the Incest Act did not embody an historic exception to public trials in England but rather altered the historic principle that "a public hearing must be insisted on in accordance with the rules which govern the general procedure in English courts of justice."

sexual assaults. Moreover, to agree with the Commonwealth that the United States authorities cited by the Commonwealth,[2] the *Globe*[3] and the American Broadcasting Companies, Inc., *et al.*, as *amici curiae*,[4] demonstrate an "American practice . . . of diversity," Brief of Appellee at 21, in cases of the present kind is not to agree that that diversity embraces a rule or practice of inflexible closure. Instead, with remarkable consistency, those statutes provide a mechanism for resolving particularized problems in a particular case against the backdrop of the presumptive openness of a criminal trial. All of those statutes provide that, under certain circumstances, a judge *may* close all or a portion of a criminal trial.[5] None say that he or she *must* close anything. And the difference between may and must is what this case is all about.

The Commonwealth's discussion of English common-law practice also supports the proposition that English courts historically have taken a particularized and sensitive approach to problems presented by certain kinds of testimony, an approach fundamentally inconsistent with the one embodied in § 16A. Succinctly put by the Commonwealth itself, the English cases on which it relies "do *not* establish a custom that in all cases involving sexual crime or the affairs of minors the English courts reflexively abandoned the principle of publicity." Brief of Appellee at 17 (emphasis added).

Equally important is that the English cases on which the Commonwealth relies are civil cases and, wardship proceed-

---

[2] Appellee's Brief at 19 n.20 and 20 n.23.

[3] Appellant's Brief at 25 n.13 and 27 n.16.

[4] Brief of *Amici Curiae*, American Broadcasting Companies, Inc., *et al.*, at 25 n.80.

[5] That is not to say, of course, that all, or even most, of those statutes today necessarily comply with the requirements of the Constitution. *See* Brief of Appellant at 27 n.16.

ings to one side,[6] simply do not support the proposition that there was a broad exception to the principle of publicity for "sensitive or painful subject matter tending to inhibit the cooperation and testimony of victims and witnesses." Brief of Appellee at 16. To be sure, in *Scott* v. *Scott*, [1913] A.C. 417, [1911-1913] All E. R. 1, the case on which the Commonwealth relies most heavily, Lord Loreburn did voice the opinion that such an exception existed. *Id.* at 446. None of the other participating Law Lords, however, agreed with him. *Id.* at 436 (Viscount Haldane); *id.* at 442 (Earl of Halsbury); *id.* at 484-85 (Lord Shaw).And even Earl Loreburn was careful to qualify his position by stating that English courts did not have unqualified power to require closed proceedings for "[t]he inveterate rule [was] that justice shall be administered in open court." *Id.* at 445. As interpreted by English courts thereafter, it is not "part of the law laid down by *Scott* v. *Scott* . . . that if publicity will deter a litigant from proceeding to obtain redress he should be allowed to bring his suit *in camera*." *Greenway* v. *Attorney General*, [1927] 44 W.L.R. 124, 126. *See also B.* (otherwise *P.*) v. *Attorney-General*, [1965] 3 All E. R. 253, [1966] 2 W.L.R. 58.

English common-law tradition, in sum, simply does not support the proposition that even civil litigation which in-

---

[6] Wardship proceedings, Brief of Appellee at 16-17, are truly *sui generis*. As explained by Lord Haldane in *Scott* v. *Scott*, [1913] A.C. at 437, in wardship proceedings

> the Court [was] really sitting primarily to guard the interest of the ward or lunatic. Its jurisdiction [was] in this respect paternal and administrative, and the disposal of controverted questions [was] an incident only in the jurisdiction.

Cf. M.G.L. ch. 119, §§ 1-39B; M.G.L. ch. 210. Accordingly, one cannot derive a principle of paternalism which swallows up all else from the fact that the court's role when exercising its wardship jurisdiction is almost exclusively paternal. *See generally B.* (otherwise *P.*) v. *Attorney-General*, [1965] 3 All E. R. 253, [1966] 2 W.L.R. 58.

volves sexual matters or children or both is automatically, or even presumptively, exempt from the general policy of openness. On the contrary, English tradition appears to support precisely the opposite proposition. And it does so notwithstanding the absence in England of organic law like that embodied in the First Amendment.[7]

II. A Hearing Prior to Closure Not Only is Necessary but also Provides a Workable Mechanism for Determining When, and to What Extent, Closure is truly Appropriate.

In Part III (C) (2) of its brief, the Commonwealth asserts that a hearing to determine the appropriateness of closure in each particular case would undermine the very interests § 16A seeks to achieve. Moreover, the Commonwealth argues, a closure hearing would be "inevitably cumbersome, stressful to the [victim], and inherently unlikely to disprove[8] the value of closure." Brief of Appellee at 38.

The Commonwealth's argument echoes fears expressed by the Supreme Judicial Court in *Globe II* that a hearing would destroy the interests served by § 16A. J.A. 102a & n.15. The Supreme Judicial Court concluded on the basis of "sugges-

---

[7] The Commonwealth's reference to the function of prior restraints in the English tradition, Brief of Appellee at 18, proves too much. The Commonwealth's apparent assertion that closure orders are necessary because prior restraints are unavailable, *id.* at n.18, suggests that the two are similar in impact and thus implicitly suggests that their validity should be tested by similar standards. Tested by the standards articulated in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), there can be no doubt that M.G.L. ch. 278, § 16A and the closure order here entered are invalid.

[8] Here the Commonwealth has it backwards. The object of the hearing would be to prove, not to disprove, the value of closure in a particular case. It is a "presumption of openness," after all, which forms the backdrop for all closure hearings.

tions" made by the *Globe* at oral argument that the closure hearing required by *Richmond Newspapers* would inevitably be a "cumbersome"[9] "side trial" at which the press would be allowed to participate and present evidence and at which the victim would be the focus of conflicting psychiatric testimony and perhaps examination and cross-examination.[10] *Id.* Building on that theme, the Supreme Judicial Court in *Globe II* rejected the Commonwealth's suggestion that § 16A could be read as a statute containing protections a minor victim could waive. For the Court, determining the validity of any waiver "would require the same potentially damaging inquiry" at a closure hearing. *Id. See* Brief of Appellee at 38-40.

One can, of course, conjure a framework for closure hearings so rigid and so formalized that an oppressive "side trial" of

---

[9] It is difficult to square the Supreme Judicial Court's concern that the closure hearing would be a "cumbersome," "time-consuming" "side trial" with its statement in *Globe I* that the hearing with regard to closure of portions of the trial other than the minor victim's testimony "should be completed expeditiously and should not ordinarily involve lengthy legal argument" (J.A. 79a).

[10] The court's implication that the *Globe* suggested at oral argument that "the press should be allowed to participate and present evidence" at a closure hearing, even to the extent of its own psychiatric testimony (J.A. 102a), goes beyond what the *Globe* actually argued. In response to a question put by Mr. Justice Liacos, the author of the *Globe I* and *Globe II* opinions, counsel for the *Globe* stated that:

> [if] we look . . . at the notion that *Richmond* says that the press and public have a right to be present and that some form of a hearing must precede deprivation of that right and then look at the numbers of cases, even in a due process context, which have talked about the kind of hearing one has to have before a right can be deprived, we are left at least with the notion that the people who have a right to be there have to [have] access and ability to participate in the hearing. But we also know, at least from the due process cases, and we are really . . . talking about a First Amendment due process case, that the kind of process which is due depends on the nature of the proceedings.

Transcript of Oral Argument at 14-15.

some duration inevitably would ensue each time the question of closure were raised. One can also envision, however, a number of approaches which the trial judge could take in order to ensure that relevant issues were ventilated expeditiously and humanely and yet with precision sufficient to permit the formation of reasoned judgment. In some instances, for example, it may be possible to conduct the closure hearing without the victim's presence in the courtroom at all. The court might, in an appropriate case, appoint a psychiatrist or psychologist to examine the victim with respect to his or her ability to testify in open court. The appointed expert then could be available for oral examination at the hearing in lieu of the victim.

If the victim were in fact to be the subject of questioning at the hearing, the trial judge might require that questions be put through an intermediary whom the victim knows and trusts, such as a parent, guardian or friend. The trial judge might require that questions to be asked the victim be submitted for advance approval or might otherwise limit the substantive areas which could be explored at the hearing. Consideration also could be given to use of supporting personnel whose function would be to guide victims of sexual assaults through their encounters with the legal process and to accompany them to hearings, trials and other legal proceedings. *See* L. Brodyaga, *et al., Rape and Its Victims, A Report for Citizens, Health Facilities and Criminal Justice Agencies* 101 (1975).[11]

---

[11] If it truly depicts what customarily happens, the Commonwealth's description of ordeals faced by rape victims during the prosecution process, Brief of Appellee at 25-28, demonstrates a compelling need for reforms of that process so that it responds more effectively to the victims. And those reforms are most likely to result, not from further isolating the victims' plight from the public view through closure of trial proceedings, but from exposing those proceedings to public scrutiny and debate. *See* Brief of *Amici Curiae*, American Broadcasting Companies, Inc., *et al.*, at 12-14. Indeed, the widespread enactment of rape shield laws by state legislatures represented the

If testimony in open court by the victim at the closure hearing is believed to raise problems, that, too, can be dealt with on a case-by-case basis. The Commonwealth itself points out that four states now permit a trial judge to order the videotaping of the entire testimony of minor witnesses in chambers in lieu of direct appearances before the jury. Brief of Appellee at 43. While there may be some doubt as to the constitutionality of such statutes in the context of the trial itself, videotaped testimony would certainly seem sufficient for a closure hearing in an appropriate case. Reasonable limitations on the number of members of the press and public permitted in the courtroom and requirements as to use of press pooling arrangements would certainly be permissible. *See Richmond Newspapers*, 448 U.S. at 581, n.18. The use of closed circuit television arrangements in which participants and spectators other than counsel, the judge, the defendant and the victim viewed the hearing on television might be considered. Indeed, one commentator has advocated the use of one-way mirrors for the examination of children in situations like those governed by § 16A. Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne St. L. Rev. 977, 1014-18 (1969). Other methods for dealing with problems which arise in a given case undoubtedly exist. It simply surpasses belief that, under the careful supervision of the presiding judge, arrangements cannot be made to make a closure hearing fruitful, expeditious and humane.

---

public's response to a perceived problem in the treatment of rape victims by the criminal justice system. *See generally* J. Tanford & A. Bocchino, *Rape Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980). Openness of court proceedings provides the public with the information necessary to judge the fairness of those proceedings to defendants and victims alike and to institute reforms where necessary. As this Court stated in *Richmond Newspapers*, these "crucial prophylactic aspects of the administration of justice cannot function in the dark . . . ." *Richmond Newspapers*, 448 U.S. at 571.

Moreover, the simplicity or complexity of the hearing would inevitably depend on the nature of the issues raised. For example, with respect to victims who desire to testify in public, such as those contemplated by Mr. Justice Wilkins in his separate opinion in *Globe II* (J.A. 107a), or who do not request exclusion of the press or public from the trial, such as those in the present case,[12] the hearing required by *Richmond Newspapers* would be relatively abbreviated. In other situations, it might

---

[12] The Commonwealth argues that, in this respect, the record "reveals a materially different story." Brief of Appellee at 30. The record, of course, speaks for itself. But in so doing, it reveals the prosecutor's statement that the Commonwealth was waiving the protections of § 16A, that the Commonwealth was doing so after the victims were "consulted fully" and that that waiver was "literally on behalf of" the victims (J.A. 28a). The record does reveal that, after empanelment began, the prosecutor spoke to the trial judge about the victims' "concerns" with respect to press attendance (J.A. 48a). In that brief colloquy, however, there was no suggestion that the victims would have been unwilling or unable to testify had the press been admitted, *compare* Brief of Appellant at 32 *with* Brief of Appellee at 30-31; that "guarantees" short of court orders, *cf.* Brief of *Amici Curiae*, American Broadcasting Companies, Inc., *et al.* at 23 n.75, would not have sufficed to alleviate all concerns the victims had; that the victims were then aware of the fact that their names were an indelible part of the public record of the case at that very moment, *see Globe II* at J.A. 103a; or that exclusion of the press meant only that their testimony would be momentarily private. Brief of Appellee at 12 n.13, 44. In sum, to draw from that uninformative colloquy the conclusion that the victims sought exclusion of the press, particularly in the teeth of a directly contrary representation made by the prosecutor in open court four days earlier, seems wholly unwarranted. To wrench from that colloquy an assertion that the victims "accepted the attendance of the press only upon terms of a prior restraint," Brief of Appellee at 2 n.2, or the insinuation that the prosecutor, when representing to the court that he had "consulted fully" with the victims, was acting out of his own best interests following consultation of dubious quality, *id.* at 2 n.2, 30, is to dress the record in clothing it simply cannot wear. Perhaps above all, differences over what "story" the record "tells" demonstrates the need, in cases like this, for a hearing prior to closure. In the absence of precise and focused inquiry in an adversary setting, precision customarily is difficult, if not impossible. *See Carroll* v. *President & Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968).

be relatively clear that closure would be appropriate given the age, the demonstrated psychological vulnerability of the victim and the nature of the crime involved. It would surely suffice to leave the form and scope of the inquiry, the type of evidence that could be presented, whether oral examination of witnesses would be allowed, or whether and under what circumstances the victim could be examined or cross-examined to the sound discretion of the trial court, informed by the necessity for creating a record susceptible to appellate review under the standards enunciated in *Richmond Newspapers*.

With respect to the role of the press and public, it would be necessary, but also sufficient, to provide that reasonable degree of participation at the hearing which is necessary to guarantee a meaningful opportunity to influence the court's determination. *See generally Carroll* v. *President & Commissioners of Princess Anne*, 393 U.S. 175, 183-84 (1968). Thus, the hearing mandated by *Richmond Newspapers* need not be the elaborate, "cumbersome" one envisioned by the Supreme Judicial Court and the Commonwealth and instead could take a number of forms, depending on the circumstances of the individual case.

The object of such a hearing, of course, ultimately would be an informed conclusion that, in the case then before the court, the interests asserted in support of closure were tangible and substantial and that they could be achieved by measures no less drastic than closure itself. More concretely, in a case arising under § 16A, the object of the hearing should be to determine whether closure is necessary to preserve the integrity of the trial itself, whether alternatives to closure will do so, and whether closure will be effective in achieving the desired result. As Mr. Justice Wilkins suggested below, an abstract legislative judgment that testimony should be taken in closed sessions simply cannot obviate the necessity for determining, in each case, whether the apprehended dangers in fact are

present. *Globe II*, J.A. 107a (Wilkins, J., concurring). *See also WXYZ, Inc.* v. *Hand*, 658 F.2d 420 (6th Cir. 1981) (Michigan statute providing for suppression of certain information about rape victims is void on its face because it does not provide for a hearing; broad legislative judgments embodied in the statute are not sufficient to make application of the statute valid in any specific case). Absent a hearing, there simply is no assurance that closure, in whole or in part, in any given case is necessary to serve any significant state interest at all.

III. Appellant has Standing to Invoke the Public Trial Guarantee of the Sixth Amendment on Behalf of a Defendant Who Opposed Closure.

In Part II of its brief, the Commonwealth argues, among other things, that the *Globe* lacks standing to press Sixth-Amendment claims asserted by Albert Aladjem, the defendant in the case below.[13] The Commonwealth also argues that even if the *Globe* once had standing to do so, Mr. Aladjem's acquittal mooted his own claims and thus necessarily mooted those derivatively raised by the *Globe*. In attacking the *Globe*'s standing, the Commonwealth asserts that a "congruence of interests" between the *Globe* and Mr. Aladjem "is not realistic," Brief of Appellee at 9, and that Mr. Aladjem did not face a genuine obstacle to assertion of a Sixth-Amendment claim on his own behalf at the time closure was ordered. In arguing that Mr. Aladjem's claims now are moot, the Commonwealth argues that his acquittal means he no longer is suffering any "injury." The absence of any current injury to Mr. Aladjem,

---

[13] The Commonwealth also argues that the *Globe* has no standing to raise any claims of its own under the Sixth Amendment. Brief of Appellee at 8-9. The arguments to the contrary advanced by the *Globe* in its original brief, Brief of Appellant at 40-46, will not be repeated here.

the argument continues, precludes the *Globe* from relying on any rights Mr. Aladjem may once have had. Brief of Appellee at 11. On both counts, the Commonwealth is in error.

At the outset, the *Globe* does not argue that its interests in, or motives for, attendance at trial and the interests of a defendant in having his trial public are necessarily congruent in every respect. It does not do so because this Court's cases do not require that that degree of congruence exist before a litigant may raise rights of absent parties. It is not identity of motive but of objective, coupled with the practical inability of the third party to vindicate his rights, which has moved this Court to grant *jus tertii* standing in the past. *See Singleton* v. *Wulff*, 428 U.S. 106, 114-18 (1976). Thus, for example, this Court has permitted sellers to assert the interests of buyers or potential buyers of their products, not because the interests of the seller and the buyer were identical, but because buyer and seller shared a common goal, *i.e.*, transfer of the product. *See Carey* v. *Population Services International*, 431 U.S. 678 (1977); *Craig* v. *Boren*, 429 U.S. 190 (1976). *See generally Eisenstadt* v. *Baird*, 405 U.S. 438 (1972).

In the present case, the *Globe* and Mr. Aladjem had the common goal of keeping the trial open to the press and public in its entirety. Even assuming that their motives for doing so differed, their objective was identical. The reportorial activity the *Globe* wished to pursue thus was inextricably bound up with the public trial Mr. Aladjem desired. Denial of his public-trial claim thus directly and adversely affected the *Globe*'s ability to report about that trial.

Moreover, there are now and were during the trial both legal and practical obstacles to Mr. Aladjem's assertion of his own Sixth-Amendment claim.[14] As was discussed in appellant's

---

[14] *See* Brief of Appellant at 48. While the Commonwealth suggests that Mr. Aladjem could have sought interlocutory appeal of the closure order en-

original brief, the imminent mootness of Mr. Aladjem's own claim has been recognized as the kind of genuine obstacle which permits a litigant to raise the claims of another. *Singleton* v. *Wulff*, 428 U.S. at 117. *See generally* Brief of Appellant at 46-47. Thus, the criteria for standing to raise the rights of absent third parties recognized by this Court in the past have been met here.

The Commonwealth's assertion that the *Globe*'s ability to assert the rights of Mr. Aladjem has been extinguished because Mr. Aladjem's own claims are moot suffers from at least two defects. The first defect is a logical one. It makes absolutely no sense to say that the imminent mootness of a third party's claim is a factor which favors relaxation of ordinary standing rules if arrival of that mootness will end the litigation in its entirety.

Second, and more important, the Commonwealth's argument fails to confine the concept of third-party standing to its proper role in constitutional litigation. In order to meet the requirements of Article III of the Constitution, a party who

---

tered in this case under M.G.L. ch. 211, § 3, it is not at all clear that the Supreme Judicial Court would have entertained such a petition. The Supreme Judicial Court has held on many occasions that the extraordinary power granted by ch. 211, § 3, "will not ordinarily be exercised to review interlocutory rulings in criminal cases since the rights of criminal defendants are generally fully protected by the regular appellate process." *Costarelli* v. *Commonwealth*, 374 Mass. 677, 679, 373 N.E.2d 1183, 1186 (1978). To take advantage of ch. 211, § 3, the defendant seeking relief must demonstrate that the error alleged is irreversible and that an order for a new trial in the normal process of appeal would not place him in the *status quo*. *Id.* For example, the Supreme Judicial Court has held that a claim of denial of the right to trial by jury is not a proper subject for a petition under ch. 211, § 3, despite the possibility that an acquittal in a non-jury trial would render the defendant's claims moot. *Whitmarsh* v. *Commonwealth*, 366 Mass. 212, 316 N.E.2d 610 (1974). Indeed, in this very case, the Supreme Judicial Court stated in *Globe I* that the single justice could have refrained from entertaining the *Globe*'s petition under ch. 211, § 3, because of the possible availability of other remedies (J.A. 62a n.3).

wishes to litigate — not an absent third party — must demonstrate that he or she has suffered an "injury-in-fact" as a result of the defendant's actions. *E.g.*, *Havens Realty Corp.* v. *Coleman*, 50 U.S.L.W. 4232, 4235 (No. 80-988) (U.S., February 24, 1982); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976); *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). "Pure standing"[15] thus established, the litigating party then must either satisfy one or more rules of self-restraint created by this Court or show that he comes within an exception to those rules before litigation may get underway. *See, e.g.*, *Barrows* v. *Jackson*, 346 U.S. 249, 255-57 (1953). The litigant who is permitted to assert the rights of an absent third party is one who has brought himself within an exception to the usual rules of self-restraint by demonstrating a sufficient nexus between the activity he wishes to pursue and the activity the third party arguably has a legal right to pursue. At all times however, the injury to the litigant himself, and that injury alone, determines whether a court has the power to entertain the action. An injury, actual or potential, to an absent third party simply provides an occasion for exercise of power otherwise established. *See Craig* v. *Boren*, 429 U.S. 190, 193-94 (1976); *Eisenstadt* v. *Baird*, 405 U.S. 438, 443-446 (1972); *Barrows* v. *Jackson*, 346 U.S. 249, 255-260 (1953).

Once litigation has been properly commenced, the power to render decisions persists as long as some combination of circumstances continues to give that litigation the hallmarks of a "present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). *See, e.g.*, *Sibron* v. *New York*, 392 U.S. 40, 50 (1968); *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 (1964); *cf. United States Parole Commission* v.

---

[15] *See* A. Bickel, *The Least Dangerous Branch* 122-24 (1962).

Geraghty, 445 U.S. 388, 403-04 (1980). The prospect of repetitive injury — injury "capable of repetition, yet evading review," *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911) — is one of the circumstances which historically has been viewed as infusing a controversy with life sufficient to keep it from mootness. Indeed, it is not necessary that the potentially repetitive injury be identical to that which triggered the litigation in the first place. *See Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979) (prospect of "similar" closure orders in the future was sufficient); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969) (prospect that "the problem" could recur was sufficient). But because it was injury to the litigant himself which gave him a sufficient stake in the outcome to establish his "pure standing" at the outset, *Baker* v. *Carr*, 369 U.S. 186, 204 (1962); *Flast* v. *Cohen*, 392 U.S. 83, 101 (1968), the question ought to be whether the possibility of repetitive injury to the litigant himself — and not to an absent third party — is sufficient to save the litigation from mootness. *Cf. Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) ([i]n determining whether state action is "capable of repetition, yet evading review," the relevant question is, in part, "whether there [is] a reasonable expectation the *same complaining party* [will] be subjected to the same action again") (emphasis added).

Here, the "injury-in-fact" suffered by the *Globe* was that it was kept from attending a portion of the trial of a criminal case it wished to attend by a statute of uniform and unwaivering applicability. As the publisher of a newspaper within the jurisdiction where the statute applies, it is likely that the *Globe* will suffer a similar injury again as long as the statute remains in force. *See generally Richmond Newspapers*, 448 U.S. at 563; *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 377-78 (1979). Undoubtedly, there will be future cases in which a defendant will assert his right to a public trial the terms of § 16A to the

contrary notwithstanding. And while the existence of *Globe II* undoubtedly will speed the process of appellate review when that asserted right is denied, it is wholly unrealistic to believe that review can be completed before the underlying criminal trial has ended. *Compare, e.g., DeFunis* v. *Odegaard*, 416 U.S. 312, 319 (1974) *with Roe* v. *Wade*, 410 U.S. 113, 125 (1973). The controversy the *Globe* brings to this Court, even to the extent that that controversy raises claims once asserted by Mr. Aladjem, thus clearly is "capable of repetition, yet evading review" and is not moot.

Conclusion.

Two years ago, in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 569 (1980), this Court said that "historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial." Massachusetts General Laws ch. 278, § 16A, is fundamentally at war with that presumption and ignores the indispensable attributes of open criminal trials. It closes to public view a critical part of each and every trial of each and every person accused of participating in a "crime involving sex" if a victim is under the age of eighteen. It does so without permitting precise and reasoned inquiry into the question whether closure is necessary to serve a subordinating state interest or any state interest at all. It does so even if all of the participants in that trial desire proceedings which are fully public. The judgment of the Supreme Judicial Court holding that the statute is consistent

with freedoms guaranteed by the First, Sixth and Fourteenth Amendments to the Constitution of the United States should be reversed.

Respectfully submitted,

JAMES F. McHUGH
MARC A. REARDON
JANE E. SERENE
BINGHAM, DANA & GOULD
100 Federal Street
Boston, Massachusetts 02110
(617) 357-9300
Counsel for Appellant

Amicus Brief

1

Office - Supreme Court, U.S.
FILED
JAN 8 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GLOBE NEWSPAPER COMPANY,
Appellant,

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK,
Appellee.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

BRIEF OF AMICI CURIAE, AMERICAN BROADCASTING COMPANIES, INC.; CBS INC.; NATIONAL ASSOCIATION OF BROADCASTERS; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; AND THE WASHINGTON POST

Of Counsel:
SAM ANTAR
AMERICAN BROADCASTING COMPANIES, INC.
7 West 66th Street
New York, New York 10023

CARL R. RAMEY
MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
Counsel for American Broadcasting Companies, Inc.

Of Counsel:
RALPH E. GOLDBERG
ALLEN SHAKLAN
CBS INC.
51 West 52 Street
New York, New York 10019

J. ROGER WOLLENBERG
TIMOTHY B. DYK *
JUDITH BARRY WISH
WILMER CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for CBS Inc.

* *Counsel of Record*

[Counsel Continued on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ERWIN G. KRASNOW
STEPHEN E. NEVAS
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Counsel for the National Association of Broadcasters

J. LAURENT SCHARFF
PIERSON, BALL & DOWD
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
Counsel for Radio-Television News Directors Association

BOISFEUILLET JONES, JR.
CAROL D. WEISMAN
1150 Fifteenth Street, N.W.
Washington, D.C. 20071
Counsel for The Washington Post

January 8, 1982

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
ARGUMENT	7
INTRODUCTION	7
I. THE FIRST AMENDMENT GENERALLY REQUIRES THAT TRIALS BE OPEN TO THE PRESS AND THE PUBLIC	9
II. UNDER *RICHMOND NEWSPAPERS*, A BLANKET EXCLUSION OF THE PRESS AND PUBLIC FROM CERTAIN CATEGORIES OF TESTIMONY IS CONSTITUTIONALLY IMPERMISSIBLE	16
III. THE ASSERTED STATE INTERESTS DO NOT, IN ANY EVENT, JUSTIFY THE STATUTE'S BLANKET EXCLUSION	19
CONCLUSION	26

TABLE OF AUTHORITIES

CASES: Page

Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455 (1949), *cert. denied*, 339 U.S. 984 (1950) 21
Commonwealth v. Leo, 393 N.E.2d 410 (Mass. 1979) 21
Commonwealth v. Marshall, 356 Mass. 432, 253 N.E.2d 333 (1969) 21
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 11, 19, 23
Douglas v. Wainwright, 521 F. Supp. 790 (M.D. Fla. 1981) 18, 26
Elfbrandt v. Russell, 384 U.S. 11 (1966) 24
Gannett Co. v. DePasquale, 443 U.S. 368 (1979) .. 10, 17, 19, 24
In re Gault, 387 U.S. 1 (1967) 22, 23
In re United States ex rel. Pulitzer Publishing Co., 635 F.2d 676 (8th Cir. 1980) 17-18, 26
In re Winship, 397 U.S. 358 (1970) 22, 23
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 19
McKeiver v. Pennsylvania, 403 U.S. 528 (1971) .. 22, 23
NAACP v. Button, 371 U.S. 415 (1963) 24
Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) 23-24
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) ..... *passim*
Sacramento Bee v. United States District Court, 656 F.2d 477 (9th Cir. 1981) 17
Shelton v. Tucker, 364 U.S. 479 (1960) 24
Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) 19, 24, 26
State v. McDonald, 404 So. 2d 889 (La. 1981) 18
State v. Wahle, 298 N.W.2d 795 (S.D. 1980) 18
United States v. Layton, 519 F. Supp. 959 (N.D. Cal. 1981) 18, 26

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS AND STATUTES: Page

First Amendment to the Constitution of the United States ..... *passim*
Sixth Amendment to the Constitution of the United States 7, 17, 21
Ala. Code § 12-21-202 (1975) 25
Ariz. R. Civ. P. 9.3 (1973) 25
Colo. R. Civ. P. 42(c) (1973) 25
Del. Code Ann. 1981 Replacement Volume, § 1516 (d) 25
Fla. Stat. Ann. § 918.16 (West Supp. 1980) 25
Ga. Code § 81-1006 (1956 Rev.) 25
Idaho R. Civ. P. 77(b) (1978 Supp.) 25
Iowa Code § 675.20 (1971) 25
Mass. Gen. Laws Ann. ch. 278, § 16A (West) (1981) ..... *passim*
1923 Mass. Acts. ch. 251, § 16A 20
1931 Mass. Acts ch. 251, § 16A 20
Mich. Comp. Laws § 766.9 (1968) 25
Miss. Const. art. 3, § 26 (1972) 25
Mont. Rev. Codes Ann. § 3-1-313 25
N.C. Gen. Stat. § 15-166 (1976) 25
N.D. Cent. Code § 27-01-02 (1981 Supp.) 25
N.H. Rev. Stat. Ann. § 632-A:8 (1979) 25
N.Y. Jud. Law § 4 (McKinney 1968) 25
Utah Code Ann. § 78-7-4 (1953) 25
Vt. Stat. Ann. tit. 12, § 1901 (1973) 25
W. Va. Code § 48-2-23 (1966) 25
Wis. Stat. § 970-03(4) (1977) 25

BOOKS AND ARTICLES:

B. Babcock, A. Freedman, E. Norton & S. Ross, SEX DISCRIMINATION AND THE LAW 13
Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977) 13
Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 Judicature 303 (1974) 13

TABLE OF AUTHORITIES—Continued

Page

Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 Judicature 391 (1975) 13

Comment, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 Hastings L. J. 1551 (1975) 14

Comment, *Police Discretion and the Judgment That a Crime Has Been Committed—Rape in Philadelphia*, 117 U. Pa. L. Rev. 277 (1968) 13

Comment, *The Rape Victim: A Victim of Society and Law*, 11 Willamette L. J. 36 (1974) 14

Ireland, *Reform Rape Legislation: A New Standard of Sexual Responsibility*, 49 Colo. L. Rev. 185 (1978) 14

Ludwig, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 Brooklyn L. Rev. 378 (1970) 13

Note, *The Admissibility of a Rape-Complainant's Previous Sexual Conduct: The Need for Legislative Reform*, 11 New Eng. L. Rev. 497 (1976) .. 14

Note, *Corroborating Charges of Rape*, 67 Colum. L. Rev. 1137 (1967) 13

Note, *Criminal Law Reform in Vermont: The Proposal to Exclude Evidence of the Victim's Character in Forcible Rape Cases*, 1 Vermont L. Rev. 215 (1976) 14

Note, *Evidence—Rape Trials—Victim's Prior Sexual History*, 27 Baylor L. Rev. 362 (1975) 13

Note, *Limitations on the Right to Introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process?*, 3 Hofstra L. Rev. 403 (1975) 13

Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L. J. 1365 (1972) 13

Note, *Rape Reform Legislation: Is It the Solution?*, 24 Clev. St. L. Rev. 463 (1975) 14

Note, *Recent Statutory Developments in the Law of Forcible Rape*, 61 Va. L. Rev. 1500 (1975) 13

TABLE OF AUTHORITIES—Continued

Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 Wm. & Mary L. Rev. (1976) 13
Tanford & Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980) 13, 14

MISCELLANEOUS: Page

Washington Post

Nov. 10, 1981, § B, at 4, col. 3 13
Nov. 13, 1981, § A, at 52, col. 2 13
Nov. 14, 1981, § B, at 1, col. 2 13
Nov. 16, 1981, § D, at 1, col. 1 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-611

GLOBE NEWSPAPER COMPANY,
Appellant,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
Appellee.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

BRIEF OF AMICI CURIAE, AMERICAN BROADCASTING COMPANIES, INC.; CBS INC.; NATIONAL ASSOCIATION OF BROADCASTERS; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; AND THE WASHINGTON POST

INTEREST OF AMICI CURIAE

This brief amici curiae is filed in support of appellant, the Globe Newspaper Company, and is accompanied by the written consents of appellant and appellee.

The amici are all newsgathering organizations or associations whose members are engaged in the newsgathering process. As such, their ability to gather and report the news is substantially and adversely affected by any statute which prohibits the press from attending criminal trials.

American Broadcasting Companies, Inc. ("ABC") operates national radio and television networks, and is the owner of television and radio stations located in major cities throughout the United States. The ABC radio and television networks maintain worldwide news-

gathering organizations and offer news programs to their affiliated stations. In addition, the ABC owned stations maintain their own local news departments and broadcast news programs.

CBS Inc. ("CBS") operates radio and television networks, and is the owner of television and radio stations located in major cities throughout the United States. The CBS television and radio networks maintain worldwide newsgathering organizations and offer news programs to their affiliated stations. Each CBS owned station also maintains its own news department and broadcasts news programs.

The National Association of Broadcasters, Inc. ("NAB") is a nonprofit association of radio and television stations and networks. As of December 16, 1981, NAB membership included 4,667 radio stations, 667 television stations, and all nationwide commercial broadcast networks.

The Radio-Television News Directors Association ("RTNDA") is a nonprofit professional organization of journalists. RTNDA includes approximately 1,700 members who are active at the network and local levels in the supervision, reporting and editing of news and public affairs programming on radio and television, both broadcast and cable.

The Washington Post, a division of Washington Post Company, publishes a daily newspaper of general circulation in the Washington, D.C. area (circulation about 750,000 weekdays, 950,000 Sundays), and maintains a substantial newsgathering organization.

STATEMENT OF THE CASE

Massachusetts General Laws chapter 278, section 16A provides that "[a]t the trial of a complaint or indictment for rape . . . or other crime involving sex" whenever "a minor under eighteen years of age is the person . . . against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case." [1]

In the criminal case underlying these proceedings, *Commonwealth v. Albert Aladjen*, Superior Court for the County of Norfolk, No. 73102-9 (1979), the Commonwealth of Massachusetts charged the defendant with the forcible rape of three girls, all minors, two sixteen and one seventeen.[2] The presiding judge on his own motion and without holding a hearing on the issue of closure ordered the preliminary motions hearing closed to the press and the public.[3] Prior to commencement of the trial, the Globe Newspaper (the "Globe") sought to intervene to assert the interest of the press in attending the trial and requested a hearing, but its motions were denied.[4] At that time the defendant objected to the

---

[1] The statute provides in full:

> "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for nonsupport of an illegitimate child, the presiding judge shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in this case." Mass. Gen. Laws Ann. ch. 278, § 16A (1981).

[2] *See Globe Newspaper Co. v. Superior Court*, 401 N.E.2d 350 (1980), which appears in the Joint Appendix filed by the parties in this case at 59a-87a [hereinafter cited as "J.A. at ——."]; *Globe Newspaper Co. v. Superior Court*, 423 N.E.2d 773 (1981), J.A. at 90a-107a. The facts are set out at J.A. at 61a, 91a-92a.

[3] J.A. at 59a, 91a.

[4] J.A. at 12a-18a.

court's closure order,[5] and at various times the prosecutor, on behalf of the three witnesses who were the alleged rape victims and the Commonwealth, stated that an exclusionary order was not requested by the Commonwealth.[6]

On its own motion, the court continued the closure order throughout the trial without ever holding a hearing or making findings that closure was necessary, since the court found that it did not have discretion to determine whether the trial should be closed. Rather, the court concluded, the Massachusetts statute required closure in all cases involving minor rape victims, and a hearing would serve no useful purpose.[7] The trial was conducted with both the press and public excluded, and the defendant was acquitted.[8]

The day after its motion to intervene was denied, appellant Globe sought an order from a single justice of

---

[5] J.A. at 18a.

[6] J.A. at 18a, 28a.

At the hearing before the single justice of the Massachusetts Supreme Judicial Court on the Globe's petition to reverse the trial court's closure order, the district attorney responsible for prosecuting the criminal case stated that in view of the fact that the defendant was asserting his right to a public trial and after discussing the closure order with the victims, the district attorney was waiving whatever rights the Commonwealth and the victims might have had to exclude the press from the trial. *See* Partial Transcript of Proceedings Before Single Justice of Massachusetts Supreme Judicial Court, *Globe Newspaper Co. v. Superior Court*, April 26, 1979, J.A. at 27a-28a.

Several days after this hearing—but during the trial—, a lobby conference between the district attorney and the trial judge took place. The prosecutor represented that the victims did not object to press attendance at the trial so long as they agreed not to print their names, photographs, or other personal data which might tend to identify them. J.A. at 48a.

[7] J.A. at 17a-18a.

[8] J.A. at 49a-57a, 61a-62a, 91a.

the Supreme Judicial Court of Massachusetts permitting members of the press to attend the trial.[9] The order was denied,[10] and the Globe subsequently appealed to the full court. After the criminal trial had been concluded, the Supreme Judicial Court in *Globe Newspaper Co. v. Superior Court*, 401 N.E.2d 350 (1980) (Globe I), held that while the statute does not require closure during the entire trial, it does mandate exclusion of the press and public whenever the minor victims of those crimes are testifying.[11] On appeal, this Court ordered that the decision be reconsidered in light of its decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).[12]

On remand, the court in *Globe Newspaper Co. v. Superior Court*, 423 N.E.2d 773 (1981) (Globe II), reaffirmed its interpretation of the statute, and held that as interpreted the statute was constitutional.[13] This appeal followed.

SUMMARY OF ARGUMENT

Massachusetts General Laws chapter 278, section 16A, as construed by the Supreme Judicial Court of Massachusetts, requires automatic exclusion of the public and the press from all trials involving sex crimes whenever a minor victim is testifying. It is plainly inconsistent with this Court's recent decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

---

[9] J.A. at 19a-42a.

[10] J.A. at 43a-44a.

[11] J.A. at 74a-77a.

[12] *See Order* of the Supreme Court of the United States, in *Globe Newspaper Co. v. Superior Court*, No. 79-1862 (October 14, 1980), J.A. at 88a.

[13] The court also stated that since the statute was silent on the issue, the transcript of the trial—including the testimony of the minor victims—would be available, in the trial court's discretion, to the public and the press. *See* J.A. at 101a n.14.

In *Richmond Newspapers* this Court held that the press has a First Amendment right to attend criminal trials. The Court also recognized the vital role of the press in gathering and reporting news about the criminal justice system. There are substantial First Amendment interests served by allowing the press to attend the type of trial involved in this case. Indeed, trials of rape and other sex crimes raise important and sensitive issues—including society's ability to protect women from heinous crimes and defendants from frivolous prosecutions, and the criminal justice system's ability to balance the interests of the rape victim who appears as a witness with the rights of the accused. The Massachusetts statute severely hampers the press in reporting on these issues and the public in gaining adequate information about them. And if the Massachusetts statute were upheld, other states could adopt similar provisions barring the press and public from attending such trials and thus further exacerbate the problem of newsgathering and reporting in this area.

In view of these First Amendment interests, *Richmond Newspapers* and subsequent federal and state court cases have made clear that a closure order may issue only after a trial court holds a hearing; makes specific findings that some overriding interest requires closure; and finds that no less restrictive alternative is adequate. The Massachusetts statute at issue here, requiring automatic closure of portions of trials involving sex crimes, violates the principles set out in *Richmond Newspapers* and thus impermissibly abridges the First Amendment right of the public and the press.

Moreover, even if some blanket exclusion could ever be justified, the blanket exclusion embodied in this statute serves no compelling state interest justifying closure. As *Richmond Newspapers* makes clear, the state's asserted interests in fostering the administration of justice are best served by open—not secret—trials. In addition, the

statute cannot be expected to achieve its purpose of protecting victims from embarrassment when they appear as witnesses. It does not prevent information about the trial, the victims, and their testimony from being disclosed through dissemination of public transcripts or second-hand views, nor would it prevent such information from being published by the print and electronic media. Every other state that has asserted an interest similar to that claimed by Massachusetts in this case has concluded that it can be accomplished by a statute that provides the trial court with discretion to order closure in individual cases. No other state has adopted a statute like the Massachusetts statute, and such a statute, mandating automatic closure, clearly violates the First Amendment.

ARGUMENT

INTRODUCTION

This Court held in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), that the press has a First Amendment right to attend and report on criminal trials. In doing so, the Court recognized the important role of the press in gathering and disseminating information about the criminal justice system to the public, and noted that our system of criminal justice is founded on the concept of a public trial, a commitment specifically guaranteed to criminal defendants by the Sixth Amendment. While these amici agree with appellant Globe that the Massachusetts statute violates the Sixth Amendment and that the Globe has standing to raise that issue, the primary concern of amici is with the First and Fourteenth Amendment issues, to which this brief is addressed.

These amici are either organizations engaged in newsgathering or associations whose members are engaged in reporting the news to the public. The amici believe that whenever the press is prohibited from attending criminal trials, it is substantially hampered in performing its essential role in our society. Because the Massachusetts statute at issue here automatically excludes the press from attending trials of sexual assaults during the tes-

timony of minor victims, it impedes the gathering and reporting of news about such trials and seriously interferes with the First Amendment rights of the press.[14]

To be sure, there may be some embarrassment if the public and the press are present during certain testimony of witnesses. In fact, there are probably many witnesses in many trials who would feel more comfortable if they could tell their story without the potential of public scrutiny. There may even be some witnesses who are reluctant to testify because of it.

But if a state were permitted to frame blanket exclusions based on assertions about embarrassment and on unproven assumptions as to the psychological and emotional state of witnesses generally, without inquiry into the facts of particular cases, large areas of testimony—perhaps even whole categories of cases—would be closed to the public and press alike. If so, the press would be unable to perform its historic function of informing the public about the criminal justice system.

Access by the press to criminal trials is of great importance generally, and specifically in cases such as the present one. Indeed, cases such as these are among the most sensitive brought in the criminal courts, and they critically test the fairness of the judicial system. The prosecution of sexual assaults, particularly rape, is a subject of national debate, raising issues such as whether there are abuses of prosecutorial discretion in instituting or refraining from instituting such proceedings;[15] whether rape victims who appear as witnesses are treated fairly;[16] whether corroborative evidence should be re-

---

[14] The testimony of the victim is often the central and crucial testimony in these cases, and second-hand accounts of the trial along with subsequent trial transcripts can not convey the demeanor of the witness on questions of credibility.

[15] *See* note 32, *infra*.

[16] *See* note 33, *infra*.

quired in rape cases;[17] and whether stiffer or mandatory sentences are needed for those convicted of rape. Any statute similar to the Massachusetts statute requiring automatic exclusion of the public and press from testimony of minor rape victims would seriously hamper the press in its effort to report, and the public in its effort to understand, those issues. Moreover, there is a danger that if the press could be excluded from such testimony, other blanket exclusions of the press might be found to be similarly permissible.

The amici urge that this Court strongly reaffirm its decision in *Richmond Newspapers* that the public and the press have a right protected by the First Amendment to attend and report on criminal trials, and invalidate the Massachusetts statute. While this Court need not decide at this time what—if any—circumstances might justify exclusion of the press or the public from a criminal trial, the Court should make clear that under *Richmond Newspapers* mandatory closure of an entire category of proceedings is never permissible and that, at a minimum, no closure order can be upheld (i) absent a hearing; (ii) proof that a compelling state interest necessitates the order; and (iii) particularized findings by the trial court that closure is the least restrictive means of achieving that compelling state interest.[18]

I. THE FIRST AMENDMENT GENERALLY REQUIRES THAT TRIALS BE OPEN TO THE PRESS AND THE PUBLIC.

The First Amendment right of the public and the press to be present at criminal trials was confirmed by

---

[17] *See* note 34, *infra*.

[18] As discussed below, it is difficult to conceive of any case in which closure could be justified by a state's asserted interest in protecting the privacy interest of a witness or an asserted interest in protecting a witness from mere embarrassment.

the various opinions in *Richmond Newspapers*.[19] That case involved a court order closing a murder trial to the public and press upon motion of the defendant. The prosecutor did not oppose the motion, and the court, relying on a Virginia statute, ordered the courtroom closed without holding a hearing and without making any findings to support its order.[20] Apparently the court, in issuing its order, was influenced by the fact that the defendant had already had three previous trials for the same offense and wished to avoid error during the proceedings then before it.[21] The court did not inquire whether any alternative to closure would have satisfied its concerns.[22]

This Court reversed. In so doing it limited the scope of its earlier decision in *Gannett Co. v. DePasquale*,[23] and held that the public and the press have a First Amendment right to attend criminal trials. Although there was no majority opinion, the plurality and concurring opinions[24] based this broad "right of access" on the "unbroken and uncontradicted" history of open trials and on the importance of informing the public about the conduct of crim-

---

[19] 448 U.S. at 569-77 (Opinion of Burger, C.J.); 584 (Stevens, J., concurring); 585-98 (Brennan, J., concurring in judgment); 599-600 (Stewart, J., concurring in judgment); 601-04 (Blackmun, J., concurring in judgment).

[20] 448 U.S. at 559-61.

[21] *Id.* at 560-61. The first trial, ending in conviction, was reversed because certain evidence introduced at trial was subsequently found to be inadmissible. The second and third trials ended in mistrials. *Id.* at 559.

[22] *Id.* at 560-61.

[23] 443 U.S. 368 (1979).

[24] Chief Justice Burger, joined by Justices White and Stevens, wrote the plurality opinion; Justice Brennan, joined by Justice Marshall, and Justices Stewart and Blackmun in separate opinions, concurred in the judgment. Justice Rehnquist dissented.

inal proceedings.[25] Indeed, the plurality noted, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted . . . ." [26] In its decision, the plurality also recognized the vital role of the press in gathering and disseminating information about the criminal justice system.[27]

As the plurality pointed out in *Richmond Newspapers*, criminal trials are, as a practical matter, inaccessible to the public generally. While in an earlier age the public's need for information about the criminal justice system may have been adequately met by attendance by the public at criminal trials in the local community, the pace and type of life in America have changed drastically in recent decades. Today, the public gets its information about the judicial system not by personally visting the local court-house, but from the press, both print and electronic, which report information about trials and the criminal justice system.[28]

---

[25] 448 U.S. at 564-78 (Opinion of Burger, C.J.); 584 (Stevens, J., concurring); 585-97 (Brennan, J., concurring in judgment); 599 (Stewart, J., concurring in judgment); 601-04 (Blackmun, J., concurring in judgment).

[26] *Id.* at 575 (Opinion of Burger, C.J.).

[27] *Id.* at 572-73 (Opinion of Burger, C.J.).

[28] Thus the plurality explained:

> "Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates of the public." 448 U.S. at 572-73 (Opinion of Burger, C.J.).

Similarly, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court said:

> "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press

This information about the judicial system enables the public to determine whether that system as a whole and the conduct of individual trials are fair and just.[29] A public thus informed is more likely to support the existing system if it is fair, or to seek remedial changes in the system if it is not.[30] Moreover, information about trials has a therapeutic value in that it provides the community with an opportunity to express outrage and frustration at the commission of a particularly heinous offense, to restore a sense of security, and to satisfy the need for retribution.[31]

That the public be informed about cases such as the present one is particularly important. These cases raise significant issues; for example, whether prosecutors abuse their discretion in instituting or refraining from instituting cases (especially where, as here, a defendant is ultimately acquitted);[32] whether victims who appear as

---

to bring to him in convenient form the facts of those operations. . . . With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Id.* at 491-92.

[29] 448 U.S. at 570 (Opinion of Burger, C.J.); 593-95 (Brennan, J., concurring in judgment).

[30] *Id.*

[31] Thus, the plurality in *Richmond Newspapers* said:

"The early history of open trials in part reflects the widespread acknowledgement, long before there were behavioral scientists, that public trials had significant community therapeutic value . . . . When a shocking crime occurs, a community reaction of outrage and public protest often follows . . . . Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion . . . . The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" 448 U.S. at 570.

[32] For example, recently in the Washington, D.C. area, there was substantial public controversy over the decision of the prosecutor to bring rape charges against a 24-year-old pregnant woman for

witnesses are treated fairly;[33] whether unnecessary impediments to conviction exist such as the requirement of corroborative evidence in rape cases;[34] and whether stiffer or mandatory sentences are desirable and necessary to prevent sexual crimes. Such issues are heatedly debated, and many states have recently revised or are presently considering changes in existing statutes with respect to

---

allegedly seducing an 8-year-old boy, where the prosecution's case rested entirely on the testimony of the minor victim. The entire trial, including the boy's testimony, was open to the press and public, and the defendant was ultimately acquitted. The newspaper chose not to print the boy's name or other identifying information. *See* Washington Post, Nov. 16, 1981, § D, at 1, col. 1; *id.*, Nov. 14, 1981, § B, at 1, col. 2; *id.*, Nov. 13, 1981, § A, at 52, col. 3; *id.*, Nov. 10, 1981, § B, at 4 col. 3.

See generally, Rudstein, *Rape Shield Laws: Some Constitutional Problems*, 18 Wm. & Mary L. Rev. 1 (1976); Comment, *Police Discretion and the Judgment That a Crime Has Been Committed—Rape in Philadelphia*, 117 U. Pa. L. Rev. 277 (1968).

[33] *See, e.g.*, Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1 (1977); Bohmer, *Judicial Attitudes Toward Rape Victims*, 57 Judicature 303 (1974); Bohmer & Blumberg, *Twice Traumatized: The Rape Victim and the Court*, 58 Judicature 391 (1975); Note, *Evidence—Rape Trials—Victim's Prior Sexual History*, 27 Baylor L. Rev. 362 (1975); Note, *Limitations on the Right to introduce Evidence Pertaining to the Prior Sexual History of the Complaining Witness in Cases of Forcible Rape: Reflection of Reality or Denial of Due Process?*, 3 Hofstra L. Rev. 403 (1975).

[34] *See, e.g.*, B. Babcock, A. Freedman, E. Norton & S. Ross, SEX DISCRIMINATION AND THE LAW 853-55; Berger, *supra* note 33; Ludwig, *The Case for Repeal of the Sex Corroboration Requirement in New York*, 36 Brooklyn L. Rev. 378 (1970); Tanford & Bocchino, *Rape Victims Shield Laws and the Sixth Amendment*, 128 U. Pa. L. Rev. 544 (1980); Note, *Corroborating Charges of Rape*, 67 Colum. L. Rev. 1137 (1967); Note, *Recent Statutory Developments in the Law of Forcible Rape*, 61 Va. L. Rev. 1500 (1975); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L. J. 1365 (1972).

the crime of rape.[35] These issues have a special significance in the context of a prosecution for the alleged rape of a juvenile,[36] and the press must be able to observe those trials and to report and comment upon the issues that they raise. Yet, if the Massachusetts statute at issue here—automatically excluding the press and the public in such cases—were upheld, the press would be severely hampered in fulfilling its important function. The effect would be even more serious if other states were to follow the Massachusetts example.

Press coverage of criminal trials also helps to ensure the impartial administration of justice in individual cases. For example, as this Court noted in *Richmond Newspapers*, a public trial discourages perjury and misconduct of trial participants by exposing them to public view.[37] It also encourages judge, jury, and counsel to perform their duties more conscientiously.[38] Moreover, press coverage of a trial makes it possible for persons

---

[35] *See, e.g.*, Ireland, *Reform Rape Legislation: A New Standard of Sexual Responsibility*, 49 Colo. L. Rev. (1978); Tanford & Bocchino, *supra* note 35; Note, *Rape Reform Legislation: Is It the Solution?*, 24 Clev. St. L. Rev. 463 (1975); Note, *The Admissibility of a Rape-Complainant's Previous Sexual Conduct: The Need for Legislative Reform*, 11 New Eng. L. Rev. 497 (1976); Note, *Criminal Law Reform in Vermont: The Proposal to Exclude Evidence of the Victim's Character in Forcible Rape Cases*, 1 Vermont L. Rev. 215 (1976); Comment, *California Rape Evidence Reform: An Analysis of Senate Bill 1678*, 26 Hastings L. J. 1551 (1975); Comment, *The Rape Victim: A Victim of Society and Law*, 11 Williamette L. J. 36 (1974).

[36] The Massachusetts court anomalously suggested that closure of the trial during the testimony of juveniles would be no impediment to the press reporting on these issues because of the ability of the press and the public to observe trials of sex-related crimes which did not involve minors. J.A. at 100a-101a. Yet, trials involving juveniles raise some of the most sensitive and significant issues.

[37] 448 U.S. at 569-70 (Opinion of Burger, C.J.); 596-97 (Brennan, J., concurring in judgment).

[38] *Id.*

who might not otherwise know that they have information relevant to the trial, or who could rebut false testimony, to come forward and testify.[39] Press coverage of trials benefits the defendant by assuring a fair trial, and the public by preventing "[a] miscarriage of justice that imprisons an innocent accused [and] leaves a guilty party at large, a continuing threat to society." [40]

While it is urged that the availability of the trial transcript substitutes for attendance by the press and the public during the testimony,[41] transcripts of trial proceedings are, as a practical matter, not readily available in many cases. In superior court practice in Massachusetts transcripts generally are not prepared unless one of the parties requests the transcript in conjunction with an appeal.[42] Thus in the present case, so far as we know, no transcript was available. Moreover, even when transcripts are prepared, they are often not available until days, weeks, or even months after the trial is complete.[43] The delay in the release of such transcripts in itself renders the information in many cases unavailable during any time that the trial itself is a matter of public concern. Finally, even if a transcript were properly available, a "cold" transcript of testimony is not an adequate substitute for an open proceeding. As Justice Brennan noted in his concurring opinion in *Richmond Newspapers*:

> "In advancing these purposes, the availability of a trial transcript is no substitute for a public pres-

---

[39] *Id.*

[40] *Id.* at 596 (Brennan, J., concurring in judgment).

[41] *See* Motion to Dismiss of Affirm at 16 n.9, 24, *Globe Newspaper Co. v. Superior Court*, S. Ct. No. 81-611 (filed Oct. 26, 1981).

[42] Telephone conversation with staff member of Clerk's Office, Superior Court for the County of Norfolk, Jan. 7, 1982.

[43] *Id.*

ence at the trial itself. As any experienced appellate judge can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the courtroom." [44]

II. UNDER *RICHMOND NEWSPAPERS*, A BLANKET EXCLUSION OF THE PRESS AND PUBLIC FROM CERTAIN CATEGORIES OF TESTIMONY IS CONSTITUTIONALLY IMPERMISSIBLE.

In light of these First Amendment interests, recognized in *Richmond Newspapers*, no asserted interest can support automatic exclusion of the press and the public from a criminal trial. As the various opinions in that case make clear, automatic exclusions of the public and the press from criminal trials will not be tolerated. Rather, a case-by-case judgment as to any "compelling circumstances" alleged to justify closure is required; a finding is required that no less restrictive alternatives are available; and nothing less than an individualized determination by the trial judge after a hearing will suffice.[45] Thus, the plurality opinion emphasized the fact that in that case the trial judge held no hearing and made no findings to support his closure order.[46] Moreover, he failed to even consider whether less restrictive alternatives—such as sequestration of witnesses—were available which would have satisfied the defendant's right to a fair trial.[47] In view of the public's First Amendment right, the plurality concluded that "the trial of a criminal case must be open to the public" unless the trial court "articulate[s] in findings" some "overriding interest" in the particular case.[48]

---

[44] 448 U.S. at 597 n.22.

[45] *See* 448 U.S. at 580-81 (Opinion Burger, C.J.); 598 (Brennan, J., concurring in judgment); 601 (Blackmun, J., concurring in judgment).

[46] 448 U.S. at 580-81.

[47] *Id.*

[48] *Id.* at 581.

Justice Brennan also concluded that a statute that "authorizes trial closures at the unfettered discretion of the judge and parties" is clearly impermissible.[49] Moreover, Justice Blackmun implicitly reaffirmed the standard for trial closures that he had urged on Sixth Amendment grounds in *Gannett Co. v. DePasquale*, 443 U.S. 368, 440 (1979).[50] Under that standard, closure is permissible only when a trial court finds, after a hearing, that closure is "strictly and inescapably necessary." [51]

In marked contrast to the present case, subsequent federal and state court decisions have held, consistent with *Richmond Newspapers*, that a closure order can issue only after a trial court (i) holds a hearing at which all interested parties are allowed to participate, including the public and the press; (ii) makes specific findings that a showing has been made that some overriding interest requires a closure order; and (iii) finds that no alternative solution is adequate.[52] Even in the

---

[49] *Id.* at 598.

[50] 448 U.S. at 601 (Blackmun, J., concurring in judgment).

[51] Dissenting in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), Justice Blackmun said:

> "At the same time, however, the public's interest in maintaining open courts requires that any exception to the rule be narrowly drawn. It comports with the Sixth Amendment to require an accused who seeks closure to establish that it is strictly and inescapably necessary in order to protect the fair trial guarantee. That finding must be made in the first instance by the trial court.
>
> ". . . .
>
> "If, after considering the essential factors, the trial court determines that the accused has carried his burden of establishing that closure is necessary, the Sixth Amendment is no barrier to reasonable restrictions on public access designed to meet that need. Any restrictions imposed, however, should extend no further than the circumstances reasonably require." *Id.* at 440, 444.

[52] *See, e.g., Sacramento Bee v. United States District Court*, 656 F.2d 477 (9th Cir. 1981); *In re United States ex rel. Pulitzer Pub-*

present case, one of the members of the court below stated that he

> "would require specific findings in each case before a trial may be closed during the testimony of a minor victim of a sex crime and would not foreclose the trial judge from concluding, on proper findings, that a trial should be entirely public." J.A. at 106a-107a.

The inappropriateness of a statute that automatically excludes the public and the press is well illustrated by the facts of this case, as the "concurrence" [53] below appeared to recognize.[54] Here, the court held no hearing; required no showing of any compelling interest to be served by closure; and failed to consider whether that interest, if any, could be accomplished by some means less infringing on the public's and press' right to attend criminal trials. Moreover, on the facts in the present case, it seems impossible to suggest that the necessary findings could be made. Here the defendants requested a public trial.[55] The prosecution, on behalf of the Common-

---

lishing Co., 635 F.2d 676 (8th Cir. 1980); *Douglas v. Wainwright*, 521 F. Supp. 790 (M.D. Fla. 1981); *United States v. Layton*, 519 F. Supp. 959 (N.D. Cal. 1981); *State v. McDonald*, 404 So. 2d 889 (La. 1981); *State v. Wahle*, 298 N.W.2d 795 (S.D. 1980).

[53] Although that opinion is denominated a "concurrence," it plainly disagrees with the court's decision in Globe II to uphold the Massachusetts mandatory closure statute. *See* J.A. at 106a-107a.

[54] Thus, Justice Wilkins said:

> "If, for example, the minor victim did not object to the trial being public during his or her testimony and the defendant wanted the entire trial to be public, or, to make the case perhaps even stronger, if the minor victim wanted the public to know precisely what a heinous crime the defendant had committed, the imputed legislative justifications for requiring the closing of the trial during the victim's testimony would in part, at least, be inapplicable. In such a case, the reasons for closing a portion of the trial would be far less persuasive than in a case in which the victim wanted the trial closed during his or her testimony." J.A. at 107a.

[55] J.A. at 18a.

wealth and the victims, stated that no closure order was requested, and the victims waived any objection to a public trial.[56] There is not even a suggestion that the victims were reluctant to come forward and testify or that they would be embarrassed by giving testimony in a public trial.[57]

III. THE ASSERTED STATE INTERESTS DO NOT, IN ANY EVENT, JUSTIFY THE STATUTE'S BLANKET EXCLUSION.

Even if *Richmond Newspapers* could be read as permitting blanket exclusions of the press during certain testimony—a reading of that decision which amici believe is untenable—the state here has shown no compelling interest which could possibly justify automatic exclusion of the press and public from the courtroom during the testimony of minor victims of sexual assaults.[58]

The various opinions in *Richmond Newspapers* make clear that closure of all or any portion of a trial may be justified only after a finding supported by the record that a compelling interest exists. Thus, the plurality stated that "absent some overriding interest," "the trial of a criminal case must be open to the public." [59] And Justice Blackmun, concurring in the judgment, concluded that closure was permissible only if it were "strictly and inescapably necessary." [60] Similarly, Justice Brennan noted that while closure of all or some part of a trial might be justified by, for example, "na-

---

[56] J.A. at 18a, 28a.

[57] *See* note 75, *infra*.

[58] Under traditional First Amendment analysis, followed in *Richmond Newspapers*, this Court had held that a First Amendment right may not be abridged absent a showing that it is necessary to serve a compelling state interest. *See, e.g., Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

[59] 448 U.S. at 581.

[60] *Id.* at 603, implicitly adopting standard he set out in his dissenting opinion in *Gannett Co. v. DePasquale*, 443 U.S. 368, 440 (1979).

tional security concerns about confidentiality," he implied that such situations undoubtedly would be rare.[61]

The state has failed to establish that this statute serves any such compelling interest. Section 16A was first enacted in 1923, and in its initial form, provided for automatic closure of criminal trials involving minor victims of sex crimes in state district courts, but only authorized superior court judges in their discretion to order closure of criminal trials involving minor victims.[62] In 1931 the statute was amended to require automatic closure in all such trial proceedings.[63]

There has been no showing in this case, or any finding by the Massachusetts court, that this statute has been applied with any regularity, nor has it been found to be a vital ingredient in the administration of justice in the Massachusetts courts. Before the present case, the Supreme Judicial Court had not held that the asserted state interests required exclusion of the press

---

[61] 448 U.S. at 598 n.24.

[62] The statute, as enacted in 1923, provided:

"At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under seventeen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for bastardy, where the mother of the child whose paternity is in question is such a minor, the presiding justice shall, if said trial is before a district court, or may, if before the superior court, exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case." 1923 Mass. Acts ch. 251, § 16A.

[63] The statute, as amended, provides:

"At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case." 1931 Mass. Acts ch. 251, § 16A.

in these cases. Thus, the court held in *Commonwealth v. Marshall*, 356 Mass. 432, 253 N.E.2d 333 (1969), that under section 16A and the Sixth Amendment, a defendant had a right to have his father, mother, brothers, sisters, and friends present in the courtroom.[64] Moreover, while members of the general public had in the past been excluded under section 16A from portions of the trial, members of the press had been permitted to remain in the courtroom.[65] Indeed, the present case is, so far as we are aware, the first time in which this Massachusetts statute has been interpreted by the Massachusetts Supreme Court to require the exclusion of the press, together with the general public, from the courtroom during the testimony of a minor rape victim.

Even though the minor victims in this case did not request closure of the proceedings to the press or public, and even though the record in this case discloses no reluctance on the part of the victims to testify, the Massachusetts Supreme Judicial Court found that the automatic exclusion mandated by the statute served substantial state interests.[66] While the court articulated these interest in various ways, they amount in substance to an asserted interest in sparing minor victims the embarrassment of public testimony. This supposedly would protect them from "psychological damage," and promote the "sound and orderly administration of justice" by encouraging minor victims of sexual assaults to come forward and institute complaints and to give "credible testimony."[67] The court concluded that these interests

---

[64] Earlier, in *Commonwealth v. Blondin*, 324 Mass. 564, 87 N.E.2d 455 (1949), *cert. denied*, 339 U.S. 984 (1950), the Massachusetts court interpreted section 16A to permit the defendant's parents, husband, wife, guardian, or friend to remain in the courtroom.

[65] *See Commonwealth v. Leo*, 393 N.E.2d 410 (Mass. 1979); *Commonwealth v. Blondin*, 324 Mass. 564, 87 N.E.2d 455 (1949), *cert. denied*, 339 U.S. 984 (1950).

[66] J.A. at 101a-105a.

[67] J.A. at 101a.

were sufficiently important to justify the abridgement of the First Amendment right of the public and the press to attend criminal trials, recognized in *Richmond Newspapers*.[68]

The facts of this case well illustrate the speculative nature of the state's asserted interest. Here the victims expressed no reluctance or embarrassment to testify in public, and the Commonwealth on their behalf did not object to a public trial nor did the Commonwealth assert any possibility of damage to the victims' credibility from an open trial.[69] In light of these facts, the only conceivable argument for the automatic closure of criminal proceedings during the testimony of minor rape victims relates not to the actual embarrassment of the victim—an interest which would be fully served by permitting closure in individual cases—but to the state's asserted interest in the protection of juveniles from themselves. Minor victims of sexual assaults who do not object to testifying in public must be protected from supposed adverse consequences to their emotional well being resulting from public testimony, even if these consequences are not apparent to the victims, their parents, their counselors or their counsel. In this connection, the Massachusetts court apparently seeks to justify the present statute by analogy to those provisions which close juvenile delinquency proceedings to the press and public, even when the juvenile wishes the proceedings to be open.[70]

Whether or not automatic closure of juvenile proceedings is constitutional,[71] reliance on those provisions is

---

[68] J.A. at 101a-105a.

[69] J.A. at 18a-28a.

[70] J.A. at 103a-105a.

[71] Serious constitutional questions are obviously presented by a state's effort to close juvenile proceedings. *Compare In re Gault*, 387 U.S. 1 (1967), and *In re Winship*, 397 U.S. 358 (1970) *with McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971). The press

misplaced. Although juvenile justice proceedings are distinct from criminal trials,[72] here a traditional criminal trial is involved and the public's First Amendment right to attend such criminal trials is fully applicable.

Moreover, here, unlike juvenile proceedings, the trial transcript—including the testimony of the minor rape victims—can, in the trial court's discretion, be made available to the press.[73] The fact that the trial transcript may be available for dissemination and publication at the conclusion of the trial and that the press has a right to report on the trial[74] demonstrates that the automatic exclusion of the press serves no substantial state interest. There has been no showing that the mere physical presence of the public and the press—rather than the potential publication of information about the trial—is a significant cause of the supposed harm to which the statute is directed. Indeed, it seems likely that the injury, if any, which the victim might experience is associated not with the mere presence of the press in the courtroom, but with the publication of the contents of the trial.[75]

---

clearly has an interest in attending and reporting on juvenile proceedings, particularly those involving violent crimes.

[72] *See, e.g., McKeiver v. Pennsylvania, supra; In re Winship, supra; In re Gault, supra* (1967).

[73] J.A. at 101a n.14.

[74] *See* Motion to Dismiss or Affirm at 16 n.9, 24, *Globe Newspaper Co. v. Superior Court*, S. Ct. No. 81-611 (filed Oct. 26, 1981).

[75] It is noteworthy that in the present case these victims were apparently only concerned with preventing publication of their identies, nor with the embarrassment that might flow from the presence of the press in the courtroom. J.A. at 48a. As a matter of policy many media choose not to publish the names of victims of sexual assaults even though they have a First Amendment right to do so. *See, e.g., Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308

It is ironic that the state in this case seeks to justify the statute as designed to promote the "sound and orderly administration of justice." As this Court held in *Richmond Newspapers*, the interests of justice are clearly served by public, not secret, trials.[76] Individuals well informed about the procedures and fairness of their criminal justice system would be more likely to prosecute and give testimony when they are the victims of crimes.

That the state's interest is not sufficiently compelling to justify a blanket exclusion is confirmed by the fact that other states asserting an interest similar to that of Massachusetts' have concluded that it can be protected by a less restrictive alternative than automatic closure.[77] So far as we have been able to determine, no other state has adopted a statute requiring automatic exclusion of the press from trial testimony of minor victims of sexual assaults.[78] In fact, so far as we are aware

---

(1977); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

Moreover, there is nothing to prevent trial participants from describing testimony and courtroom occurrences to the press or to prevent the press from publishing such second-hand accounts. The potential, indeed probable, inaccuracy of such accounts strongly supports the interest of the press in attending the trial and reporting based on first-hand information.

[76] *See Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring in judgment). *See also Gannett Co. v. DePasquale*, 443 U.S. at 428-29 (Blackmun, J., dissenting).

[77] This Court has held in cases involving the permissibility of restrictions on the exercise of First Amendment freedoms that "[p]recision of regulation must be the touchstone." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Moreover, "[l]egitimate goals "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'" *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966), *quoting Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

[78] While Fla. Stat. Ann. § 918.16 (West Supp. 1980) provides for automatic exclusion of the general public from the courtroom during the testimony of minor victims in trials involving sex crimes, it

only two other states, Iowa and West Virginia, have adopted statutes requiring automatic closure of trials in any type of case.[79] And, at least sixteen states, while asserting an interest in protecting victims of sex crimes —including minors—from embarrassment, have obviously concluded that the asserted interest can be protected by authorizing the trial judge to order closure of the trial if he determines that a compelling interest requires it.[80] Thus, the suggestion of the Massachusetts court that there exists a "notable exception" to the tradition of public trials which justified the Massachusetts statute is simply inaccurate.[81] Even Massachusetts, from 1931 until this case, interpreted this statute very narrowly to exclude only spectators—not the press—from the courtroom.[82]

---

specifically provides for access to such testimony and trials by the press.

[79] *See* Iowa Code § 675.20 (1971), providing for exclusion of the general public in paternity cases; W. Va. Code § 48-2-23 (1966), providing that divorce suits "shall be tried before the Court in chambers." These statutes also obviously raise substantial constitutional questions.

[80] These statutes provide the trial court with discretion to decide whether to exclude the public in certain circumstances; however they set no standards to guide the courts in making this determination. The amici, therefore, express no views as to whether these statutes, as they may be applied, are themselves constitutional under *Richmond Newspapers*, but simply point out their existence. *See* Ala. Code § 12-21-202 (1975); Ariz. R. Civ. P. 9.3 (1973); Colo. R. Civ. P. 42(c) (1973); Del. Code Ann. 1981 Replacement Volume, § 1516(a); Ga. Code § 81-1006 (1956 Rev.); Idaho R. Civ. P. 77(b) (1978 Supp.); Mich. Comp. Laws § 766.9 (1968); Miss. Const. art. 3, § 26 (1972); Mont. Rev. Codes Ann. § 3-1-313 (1979); N.C. Gen. Stat. § 15-166 (1976); N.D. Cent. Code § 27-01-02 (1981 Supp.); N.H. Rev. Stat. Ann. § 632-A:8 (1979); N.Y. Jud. Law § 4 (McKinney 1968); Utah Code Ann. § 78-7-4 (1953); Vt. Stat. Ann. tit. 12, § 1901 (1973); Wis. Stat. § 970.03(4) (1977).

[81] J.A. at 98a.

[82] *See* discussion *supra* at pp. 20-21.

Under these circumstances, the state's asserted interest is far from compelling; as such, it cannot possibly outweigh the right of the press and the public in attending trial testimony, particularly since other less restrictive means of achieving the state's objective may exist.[83]

This Court should, in light of *Richmond Newspapers*, invalidate the Massachusetts statute and require that Massachusetts, like other states, adopt a case-by-case approach to the closure of trial proceedings involving minor victims of sexual assaults. Such closure should be permitted only after a showing of "compelling circumstances" at an appropriate hearing at which both the press and the public are allowed to present their arguments against closure of the proceedings, and after findings by the court that no less restrictive alternative exists.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Judicial Court for the Commonwealth of Massachusetts should be reversed.

---

[83] For example, the National Council of Juvenile Court Judges has advocated cooperation between the press and the court to voluntarily withhold publication of certain potentially embarrassing information. Indeed, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), this Court pointed to the possible use of such cooperative arrangements in invalidating a West Virginia statute that made it a criminal offense for a newspaper to publish the name of a juvenile offender without permission of the court. Lower federal and state court cases following *Richmond Newspapers* have similarly required that the least restrictive means of accomplishing the state's asserted interest be adopted. *See, e.g., In re United States ex rel. Pulitzer Publishing Co.*, 635 F.2d 676 (8th Cir. 1980); *Douglas v. Wainwright*, 521 F. Supp. 790 (M.D. Fla. 1981); *United States v. Layton*, 519 F. Supp. 959 (N.D. Cal. 1981).

Respectfully submitted,

Of Counsel:
SAM ANTAR
AMERICAN BROADCASTING COMPANIES, INC.
7 West 66th Street
New York, New York 10023

Of Counsel:
RALPH E. GOLDBERG
ALLEN SHAKLAN
CBS INC.
51 West 52 Street
New York, New York 10019

CARL R. RAMEY
MCKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
Counsel for American Broadcasting Companies, Inc.

J. ROGER WOLLENBERG
TIMOTHY B. DYK *
JUDITH BARRY WISH
WILMER CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for CBS Inc.

ERWIN G. KRASNOW
STEPHEN E. NEVAS
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
Counsel for the National Association of Broadcasters

J. LAURENT SCHARFF
PIERSON, BALL & DOWD
1200 Eighteenth Street, N.W.
Washington, D.C. 20036
Counsel for Radio-Television News Directors Association

BOISFEUILLET JONES, JR.
CAROL D. WEISMAN
1150 Fifteenth Street, N.W.
Washington, D.C. 20071
Counsel for The Washington Post

January 8, 1982

* *Counsel of Record*

Amicus Brief

2

Office - Supreme Court, U.S.
FILED
JAN 6 1982
ALEXANDER L. STEVAS
CLERK

No. 81-611

In the Supreme Court of the United States

October Term, 1981

GLOBE NEWSPAPER COMPANY,
Appellant,

vs.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

Brief of Amici Curiae The Miami Herald Publishing Company, Nebraska Press Association and Media of Nebraska, Oklahoma Publishing Company, Landmark Communications, Inc., Daily Mail Publishing Co., Daily Gazette Co., Gannett Co., Inc., Richmond Newspapers, Inc., Dow Jones & Company, Inc., The Los Angeles Times, Advance Publications, Inc., Chicago Sun-Times, Detroit Free Press, Newsday, Philadelphia Inquirer, Des Moines Register and Tribune Company, Indianapolis Star and Indianapolis News, Courier-Journal and Louisville Times Company, Arizona Republic and Phoenix Gazette, Seattle Times Company, Tribune Company, Bergen Evening Record Corporation, San Jose Mercury and San Jose News, News and Sun-Sentinel Company, Chesapeake Publishing Corporation, Associated Press, American Newspaper Publishers Association, The American Society of Newspaper Editors, Society of Professional Journalists, National Newspaper Association, New England Newspaper Association, Southern Newspaper Publishers Association, Alabama Press Association, and Massachusetts Newspaper Publishers Association

(All Counsel on Following Pages)

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

DAN PAUL
(Counsel of Record)
RICHARD J. OVELMEN
PAUL & THOMSON
1300 Southeast First National
Bank Building
Miami, Florida 33131
(305) 371-2000
Attorneys for Amici Curiae

JAMES D. SPANIOLO
General Counsel
The Miami Herald Publishing
Company
One Herald Plaza
Miami, Florida 33101
Attorney for The Miami Herald
Publishing Company

GARY G. GERLACH
Executive Vice President and
General Counsel
BARBARA M. MACK
Associate General Counsel
Des Moines Register and Tribune
715 Locust Street
Des Moines, Iowa 50304
Attorneys for Des Moines Register
and Tribune Company

ALICE NEFF LUCAN
Attorney, Law Department
Gannett Co., Inc.
Lincoln Tower
Rochester, New York 14604
Attorney for Gannett Co., Inc.

RICHARD N. WINFIELD
ROGERS & WELLS
Two Hundred Park Avenue
New York, New York 10166
Attorneys for Associated Press

ROBERT C. LOBDELL
Vice President and General Counsel
HAROLD W. FUSON, JR.
Staff Counsel
The Los Angeles Times
Times Mirror Square
Los Angeles, California 90053
Attorneys for The Los Angeles Times

A. DANIEL FELDMAN
ISHAM, LINCOLN & BEALE
One First National Plaza
Chicago, Illinois 60603
Attorneys for Chicago Sun-Times
(Field Enterprises, Inc.)

JON L. FLEISCHAKER
WYATT, TARRANT & COMBS
28th Floor, Citizens Plaza
Louisville, Kentucky 40202
Attorneys for Courier-Journal
and Louisville Times Company

ROBERT SACK
PATTERSON, BELKNAP, WEBB & TYLER
30 Rockefeller Plaza
New York, New York 10112
Attorneys for Dow Jones &
Company, Inc.

P. CAMERON DEVORE
DAVIS, WRIGHT, TODD, RIESE & JONES
4200 Seattle-First National Bank Building
Seattle, Washington 98154
Attorneys for Seattle Times Company

ANDREW L. HUGHES
TOWNLEY & UPDIKE
Chrysler Building
405 Lexington Avenue
New York, New York 10174
Attorneys for Newsday

SAMUEL E. KLEIN
KOHN, SAVETT, MARION & GRAF, P.C.
1700 Market Street
Philadelphia, Pennsylvania 19103
Attorneys for Philadelphia Inquirer

ALAN E. PETERSON
CLINE, WILLIAMS, WRIGHT, JOHNSON & OLDFATHER
Suite 1900 First National Bank Building
13th & M Streets
Lincoln, Nebraska 68508
Attorneys for Nebraska Press Association and Counsel for Media of Nebraska

BRUCE W. SANFORD
BAKER & HOSTETLER
818 Connecticut Avenue, N.W.
Washington, D.C. 20006
Attorneys for The Society of Professional Journalists, Sigma Delta Chi

J. LAURENT SCHARFF
PIERSON, BALL & DOWD
1000 Ring Building
1200 18th Street, N.W.
Washington, D.C. 20036
Attorneys for Oklahoma Publishing Company

W. TERRY MAGUIRE
Vice President/General Counsel
American Newspaper Publishers Association
Box 17407
Dulles International Airport
Washington, D.C. 20041
Attorney for American Newspaper Publishers Association

RICHARD M. SCHMIDT, JR.
COHN AND MARKS
Suite 600
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Attorneys for The American Society of Newspaper Editors

ARTHUR SACKLER
General Counsel
National Newspaper Association
1627 K Street, N.W.
Washington, D.C. 20006
Attorney for National Newspaper Association

PETER G. BANTA
WINNE, BANTA & RIZZI
25 East Salem Street
Hackensack, New Jersey 07602
Attorneys for Bergen Evening Record Corporation

PETER C. GOULD
SABIN, BERMANT & BLAU
350 Madison Avenue
New York, New York 10017
Attorneys for Advance Publications, Inc.

THEODORE SHERBOW
SHERBOW, SHEA & TATELBAUM, P.A.
Charles Center South
36 South Charles Street
Baltimore, Maryland 21201
Attorneys for Chesapeake Publishing Corporation

ALEXANDER WELLFORD
CHRISTIAN, BARTON, EPPS,
BRENT & CHAPPELL
1200 Mutual Building
Richmond, Virginia 23219
Attorneys for Richmond Newspapers, Inc.

RUDOLPH L. DI TRAPANO
TRAPANO, JACKSON & BUFFA
604 Virginia Street East
Charleston, West Virginia 25301
Attorneys for Daily Gazette Co.

F. PAUL CHAMBERS
JACKSON, KELLY, HOLT &
O'FARRELL
1500 One Valley Square
Charleston, West Virginia 25322
Attorneys for Daily Mail Publishing Co.

EDWARD O. DE LANEY
BARNES & THORNBURG
1313 Merchants Bank Building
Indianapolis, Indiana 46204
Attorneys for The Indianapolis Star and The Indianapolis News

JAMES F. HENDERSON
GUST, ROSENFELD, DIVELBESS
& HENDERSON
3300 Valley Bank Center
Phoenix, Arizona 85073
Attorneys for Arizona Republic and Phoenix Gazette

DAVID M. OLIVE
MCMILLAN & SPRATLING
1550 First National-Southern
Natural Building
Birmingham, Alabama 35203
Attorneys for Alabama Press Association

CONRAD M. SHUMADINE
WILCOX, SAVAGE, DICKSON, HOLLIS
& ELEY, P.C.
1800 Virginia National Bank Building
Norfolk, Virginia 23510
Attorneys for Landmark Communications, Inc.

PRESTON MOORE
HOLLAND & KNIGHT
Post Office Box 1288
Tampa, Florida 33601
Attorneys for The Tribune Company

LAWRENCE GUNNELS
REUBEN & PROCTOR
Suite 2001
11 South La Salle Street
Chicago, Illinois 60603
Attorneys for News and Sun-Sentinel Co.

TABLE OF CONTENTS

INTRODUCTION AND INTEREST OF AMICI 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. The Closure Statute Violates the First Amendment Right of the Public and the Press to Attend Criminal Trials 4

A. The Public and the Press May Not Be Excluded From Any Criminal Trial Absent an Overriding Interest Articulated in Findings by the Trial Court Because Public Attendance Serves Fundamental Interests Protected by the First Amendment 4

B. The Closure Statute Violates the First Amendment Right of the Public and the Press to Attend Criminal Trials Because It Provides for Mandatory Closure of Crucial Trial Testimony 9

1. The Closure Statute Violates the First Amendment Because It Mandates Exclusion of the Public From Crucial Portions of Criminal Trials Without Requiring Findings by the Trial Court That an Overriding Interest Supporting Closure Has Been Shown 9

2. There Is No Tradition of Automatically Closed Trials for Sex-Related Offenses 21

C. The Closure Statute Violates the First Amendment Because It Authorizes the Discretionary Closure of Trials 24

1. Adoption of a Discretionary Standard for Closure Violates the First Amendment Right of the Public and the Press to Attend Criminal Trials 24

2. The Court Should Adopt a Standard for Closure Requiring That Movants Seeking to Exclude the Public and the Press From Criminal Trials Must Make an Evidentiary Showing That (i) Access Would Cause Irreparable Harm to a Subordinating State Interest Which Is Compelling; (ii) All Alternatives to Closure Less Intrusive of First Amendment Rights Have Been Exhausted; (iii) The Closure Order Sought Is No Broader Than Necessary to Serve That Interest; and (iv) Closure Will Succeed in Serving That Interest 25

CONCLUSION 30

APPENDIX A1

CERTIFICATE OF SERVICE A8

Table of Citations

CASES

A Quantity of Books v. Kansas, 378 U.S. 205 (1961) 26

Ashland Publishing Co. v. Asbury, 612 S.W.2d 749 (Ky. Ct. App. 1980) 27

Beauchamp v. Cahill, 297 Ky. 505, 180 S.W.2d 423 (1944) 22

Benedict v. People, 23 Colo. 126, 46 P. 637 (1896) 23

Buckley v. Valeo, 424 U.S. 1 (1976) 11, 29

Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175 (1968) 26

Commonwealth v. Blondin, 324 Mass. 564, 87 N.E.2d 455 (Mass. 1949) 22
Connecticut v. Purvis, 157 Conn. 198, 251 A.2d 178 (1968), *cert. denied* 395 U.S. 928 (1969) 22
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 6
Craig v. Harney, 331 U.S. 367 (1947) 8
Detroit Free Press v. Recorder's Court Judge, 409 Mich. 364, 294 N.W.2d 827 (1980) 27
Douglas v. State, 328 So.2d 18 (Fla. 1976), *cert. denied* 429 U.S. 871 (1976) 23
Duncan v. Louisiana, 391 U.S. 145 (1968) 4
Elrod v. Burns, 427 U.S. 347 (1976) 29
Estes v. Texas, 381 U.S. 532 (1965) 6
Ex parte Rudolph, 276 Ala. 392, 162 So.2d 486 (Ala. 1964) 22
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 11, 19, 20, 29
Freedman v. Maryland, 380 U.S. 51 (1965) 26
Gannett v. DePasquale, 443 U.S. 368 (1979) ..... *passim*
Geise v. United States, 262 F.2d 151 (9th Cir. 1958), *cert. denied*, 361 U.S. 842 (1959) 23
Globe Newspaper v. Superior Court, Mass. Adv. Sh. 485, 401 N.E.2d 360 (1980) ..... *passim*
Globe Newspaper v. Superior Court, Mass. Adv. Sh. 1493, 423 N.E.2d 773 (1981) ..... *passim*
Hogan v. State, 191 Ark. 437, 86 S.W.2d 931 (1935) 22
In Re Oliver, 333 U.S. 257 (1948) 6, 25
In Re United States ex rel. Pulitzer Pub. Co., 635 F.2d 676 (8th Cir. 1980) 27
Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957) 26
Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829 (1978) 6, 7, 8, 11

Lexington Herald Leader Co., Inc. v. Tackett, 601 S.W.2d 905 (Ky. 1980) 18
Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977) 11, 20
Marcus v. A Search Warrant of Property, 367 U.S. 717 (1961) 26
Mills v. Alabama, 384 U.S. 214 (1966) 6, 7
Moore v. State, 151 Ga. 648, 108 S.E. 47 (Ga. 1921) 22
N.A.A.C.P. v. Button, 371 U.S. 415 (1963) 29
Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) 6, 18
Ocala Star Banner Corp. et al. v. Sturgis, 388 So.2d 1367 (Fla. 5th DCA 1980) 28
Patuxent Publishing Corp. v. State, 48 Md. App. 689, 429 A.2d 554 (Md. 1981) 27
Pennekamp v. Florida, 328 U.S. 331 (1946) 6
People v. Latimore, 33 Ill.App.3d 812, 342 N.E.2d 209 (Ill. 5th DC 1975) 22
People v. March, 95 Ill.App.3d 46 (1981) 27
Price v. State, 496 S.W.2d 103 (Tex.Ct.Crim.App. 1973) 22
Richmond Newspapers, Inc. v. Commonwealth of Virginia, 448 U.S. 555 (1980) ..... *passim*
Riley v. State, 83 Nev. 282, 429 P.2d 59 (Nev. 1967) 22
Sacramento Bee v. United States District Court, 656 F. 2d 477 (9th Cir. 1981) 27
Sheppard v. Maxwell, 384 U.S. 333 (1966) 6, 7
Shuttlesworth v. City of Birmingham, 397 U.S. 147 (1969) 24
Speiser v. Randall, 357 U.S. 513 (1958) 26, 27
Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532 (2nd Cir. 1974) 5

State of Florida ex rel. The Pensacola News-Journal, et al. v. Fleet, 388 So.2d 1106 (Fla. 1st DCA 1980) 16, 28
State v. Callahan, 100 Minn. 63, 110 N.W. 342 (1907) 23
State v. Damms, 62 S.D. 123, 252 N.W. 7 (1934) 22
State v. Green, 395 So.2d 532 (Fla. 1981) 27
State v. Schmit, 273 Minn. 78, 139 N.W.2d 800 (1966) 18
State v. Sinclair, 274 S.E.2d 411 (S.C. 1980) 27
State v. Wahle, 298 N.W.2d 795 (S.D. 1980) 27
Staub v. City of Baxley, 355 U.S. 313 (1958) 24
Tinker v. Des Moines School District, 393 U.S. 503 (1969) 21
Trotter v. Stephens, 241 F.Supp. 33 (E.D.Ark. 1965) 23
United States ex rel. Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), *cert denied* 434 U.S. 1076 (1978) 23
United States v. O'Brien, 391 U.S. 367 (1968) 11
Virginia Board of Pharmacy v. Virginia Consumer Council, 425 U.S. 748 (1976) 20
Whitney v. California, 274 U.S. 357 (1927) 11
Wood v. Georgia, 370 U.S. 375 (1962) 6

UNITED STATES CONSTITUTION

First Amendment, United States Constitution .....*passim*
Sixth Amendment, United States Constitution .....*passim*
Fourteenth Amendment, United States Constitution .....*passim*

STATE RULES AND STATUTORY PROVISIONS

Alabama Code §12-21-202 21
Arizona Revised Statutes Annotated §12-2312 21
Arizona Rules of Criminal Procedure 9.3(c) 21
Florida Statutes Annotated §918.16 (West Supp. 1980) 21
Georgia Code §81-1006 21
Kentucky Rules Criminal 9.50 21

Massachusetts General Laws c. 278 §16A ("Closure Statute") ..... *passim*
Mississippi Constitution, Article III, §26 21
Montana Revised Codes Annotated §46-15-401 21
Nebraska Revised Statutes §28-321 21
New Hampshire Revised Statutes Annotated §632-A:8 21
New Mexico Statutes Annotated §30-9-17 21
New York Judicial Law (McKinney) §4 21
North Carolina Statutes §15-166 21
South Carolina Code §16-3-660 21
Utah Code Annotated §78-7-4 21
Virginia Code §19.2-266 21
Vermont Statutes Annotated, Title 12, §1901 21

OTHER AUTHORITIES

156 ALR 265 22
48 ALR 2d 1436 22
62 ALR 2d 509 22
31 ALR 3d 816 22
39 ALR 3d 852 22
59 ALR 3d 1007 22
79 ALR 3d 401 22
Monaghan, *First Amendment Due Process*, 83 HARV. L.REV. 844 (1970) 26
Note, *The Accused's Right to a Public Trial*, 49 COL.L. REV. 110 (1979) 18
Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 468 (1969) 11
PAUL, SPANIOLO, BOHRER AND OVELMEN, *Access*, NINTH COMMUNICATIONS LAW INSTITUTE (1981) 9, 25, 26
Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY AND PUBLIC AFFAIRS 204 (1972) 19
TRIBE, AMERICAN CONSTITUTIONAL LAW (1978) 11, 26

INTRODUCTION AND INTEREST OF AMICI

The amici curiae or their members are publishers, broadcasters, editors, reporters, and photographers, working throughout the United States. (*See* Appendix)

All of the amici curiae have a strong professional interest in reporting trials to the general public, and all would be adversely affected if the Court upheld the inflexible, mandatory closure statute enacted by Massachusetts. Moreover, the amici curiae have become embroiled in litigation throughout the country regarding public attendance at trials, because many courts have formulated no clear standards for closure. Such litigation imposes a heavy burden on the right of the amici to gather news and the public's right to be informed about its criminal justice system. The amici curiae respectfully urge the Court to provide greater guidance to the state and lower federal courts by adopting the stringent procedural safeguards to prevent unwarranted trial closures suggested in the Argument below.

STATEMENT OF THE CASE

We adopt the Statement of the Case presented by Appellant Globe Newspaper Company (the "Globe").

SUMMARY OF ARGUMENT

In *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980) ("Richmond Newspapers"), this Court noted that throughout its historical evolution in this country, the criminal trial "has been open to all who cared to observe", *Id.* at 564 and held that this "unbroken, uncontradicted history, supported by reasons as valid today as in centuries past", *Id.* at 573, required the recognition of a First Amendment right of the public and the press to attend criminal trials.

The opinions of the Justices of the Court in *Richmond Newspapers,* as well as many prior decisions, identify an imposing array of fundamental interests supporting public access to trials. To protect these interests, the Court in *Richmond Newspapers* held that the right to attend trials could be restricted only in the most extraordinary circumstances and only by narrowly drawn restraints serving overriding interests specifically articulated in findings by the trial court. These interests, and this rule, apply with equal force to trials of sex crimes committed against minors.

The Massachusetts closure statute fails to follow the teaching of *Richmond Newspapers* because it provides for the *mandatory closure* of all trial testimony by minors alleging that they have been the victims of sex-related offenses without requiring any finding by the trial court of an overriding interest supporting closure. The statute does not permit access where the defendant demands that such testimony be public, where the minor witness requests the testimony be made in open court, where the minor could or would testify in open court, where the closed testimony is essentially the entire case against the accused, or where the public already knows the details of the crime. Such a sweeping statute directly violates the rule laid down by this Court in *Richmond Newspapers,* and gives no weight to First Amendment interests.

The public policy considerations advanced in support of the closure statute do not support *mandatory* exclusion of the public. The basis for any exclusion of some spectators turns solely on the asserted individual psychological reaction of some child witnesses to giving trial testimony, a ground which can be judged only case-by-case.

Trial judges are fully capable of conducting hearings in a sensitive manner, where such are necessary to determine whether minors can testify at trial, and such hear-

ings need not rehearse the testimony the minor would give at trial.

Mandatory exclusion of the public is also impermissibly paternalistic. It does not protect the minor witness, rather it supplants the minor's right to determine whether his testimony should be presented in public. As such it directly abridges the right of a willing speaker to convey facts to the public. In addition, it restricts such expression only on the ground that some members of the public are not sufficiently rational to react properly to it. Government may not abridge the First Amendment rights of a willing speaker for such reasons.

The Massachusetts Supreme Judicial Court ("Massachusetts Court") defends its *departure* from *Richmond Newspapers* by asserting there is an exception to our tradition of open trials for cases involving testimony of minors alleging they have suffered sexual assaults. This assertion is simply mistaken. A review of the authority, including particularly the authority relied upon by the Massachusetts Court, reveals no such exception exists. Other states have not found it necessary to enact such statutes, and the case law does not support mandatory exclusion of the public.

The stringent requirements of First Amendment Due Process, and the unfortunate explosion of judicial closures over the past two and one-half years, suggest the need for this Court to adopt clear standards for closure to guide the state and lower federal courts. Since the exclusion of the public and press from criminal trials is an extraordinary remedy virtually unheard of in our tradition, such closures should be granted only if the movant shows (i) access would irreparably injure a subordinating and compelling state interest, (ii) no less intrusive alternative exists, (iii) the closure order is no broader than necessary to protect that interest, and (iv) that entry of the order will protect that interest.

ARGUMENT

I. The Closure Statute Violates the First Amendment Right of the Public and the Press to Attend Criminal Trials

A. The Public and the Press May Not Be Excluded From Any Criminal Trial Absent an Overriding Interest Articulated in Findings by the Trial Court Because Public Attendance Serves Fundamental Interests Protected by the First Amendment

In *Richmond Newspapers* the Court held that the public and the press enjoy a fundamental right to attend state criminal trials under the First and Fourteenth Amendments.[1] As the Chief Justice noted in the plurality opinion, the American criminal trial traditionally "has been open to all who cared to observe." *Id.* at 564. This "unbroken, uncontradicted history, supported by reasons as valid today as in centuries past," *Id.* at 573, creates a very strong presumption indeed that all trials should be open to the public. "Such abiding adherence to the principle of open trials reflects a profound judgment about the way in which law should be enforced and administered" in this country. *Id.* at 593, quoting in part *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). For us, "justice" has always meant "public justice", and "[W]ith

---

1. There was no majority opinion of the Court, but no fewer than seven Justices held that the right of the public and press to attend state criminal trials was served by the First Amendment. 448 U.S. at 580 (Burger, Ch.J., plurality opinion joined by Stevens, J. and White, J.); 448 U.S. at 582 (White, J., concurring); 448 U.S. at 584 (Stevens, J., concurring); 448 U.S. at 585 (Brennan, J., and Marshall, J., concurring); 448 U.S. at 599 (Stewart, J., concurring); 448 U.S. at 604 (Blackmun, J., concurring). Only Justice Rehnquist disagreed, 448 U.S. at 606. While Justice Powell did not participate in *Richmond Newspapers*, he had anticipated the Court's holding by finding a First Amendment right of access to all judicial proceedings in *Gannett v. DePasquale*, 443 U.S. 368, 397 (1979) ("*Gannett*").

us, a trial is by very definition a proceeding open to the press and to the public" *Richmond Newspapers,* at 599 (Stewart, J., concurring).

While no single standard for adjudicating motions to close trials was adopted in *Richmond Newspapers,* the concurring opinions make it clear that motions seeking to close trials may be granted, if ever, only in the most extraordinary circumstances. The Chief Justice joined by Justices Stevens and White, stated that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public", *Id.* at 581. Justice Brennan, writing also for Justice Marshall, found that "resolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances." *Id.* at 597-98. Only "countervailing interests . . . sufficiently compelling to reverse this presumptive openness" would warrant closure. *Id.* at 598. Justice Brennan's concurrence did not purport to identify every interest that might support closure, but he did provide the highly suggestive example of "national security" interests, *Id.* at n. 24, and he pointedly noted that "closing a trial lacks even the justification for barring the door to pretrial hearings. . ." *Id.* at n. 25. Justice Blackmun's concurrence stated his continued adherence to the view that closure of judicial proceedings would be permissible only where "strictly and inescapably necessary". *Id.* at 603-04.[2]

---

2. As noted above, Justice Powell recognized the First Amendment right in *Gannett.* Even Justice Stewart's concurring opinion, which might appear less strongly committed to access than the opinions of the other members of the Court (except Justice Rehnquist), endorsed the opinion of the Court in *Stamicarbon, N.V. v. American Cyanamid Co.,* 506 F.2d 532, 542 (2nd Cir. 1974) which held that "[I]t is only under the most exceptional circumstances that limited portions of a criminal trial may be even partially closed . . . [and then only where the trial court finds] that the full benefit of a public trial could be secured . . . by limited restrictions or access."

The Court has determined that trials may be closed only where the trial court has found closure would serve an overriding interest, because so many substantial interests deserving of constitutional protection are served by public access to trials. In *Richmond Newspapers* and numerous other decisions,[3] the Court has discussed many of these fundamental interests. The Court has noted public trials serve a crucial "therapeutic value" by enabling the public to observe "the means used to achieve justice" and thereby assuring "public acceptance of both the process and its results." *Id.* at 572. This "therapeutic value" would seem especially important to trials of sex crimes committed against minors. It is just such crimes which seem to generate the greatest sense of community outrage and for which some therapeutic measures are most needed.

The Court often has observed that public attendance at trials, particularly by members of the press, protects the right of the accused to a fair trial. "The right to a public trial, the Court stated, 'has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power'." *Gannett,* at 380-81, quoting in part, *In Re Oliver,* 333 U.S. 257, 270 (1948); *See also, Estes v. Texas,* 381 U.S. 532, 538-39 (1965). There is no basis for concluding that the accused in a crime relating to a sexual offense against a minor is in less

---

3. *Gannett,* 433 U.S. at 383-4, 412-14; *Landmark Communications, Inc. v. Commonwealth of Virginia,* 435 U.S. 829 (1978); *Nebraska Press Assoc. v. Stuart,* 427 U.S. 539, 586-88 (1976) (Brennan, J., concurring); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492-96 (1975); *Wood v. Georgia,* 370 U.S. 375 (1962); *Sheppard v. Maxwell,* 384 U.S. 333, 350 (1966); *Mills v. Alabama,* 384 U.S. 214, 218 (1966); *Pennekamp v. Florida,* 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring).

need of such protection than are defendants in other sorts of trials.

But public access does not serve the interests of the accused alone. The Court has stated on numerous occasions that "[T]he press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and the judicial process to extensive public scrutiny and criticism" *Sheppard v. Maxwell, supra* at 350; *Landmark Communications, Inc. v. Commonwealth of Virginia, supra* at 838-39; *Mills v. Alabama, supra* at 218. There is certainly no hint in the record that the acquittal here was the result of corruption, but trial secrecy not only breeds such unlawful practices, it fosters public speculation or rumors regarding the integrity of the trial and the participants. The trials of sex-related crimes involving minor complainants are as much the proper target of public scrutiny, and as subject to virulent speculation, as are any other judicial proceedings.

The decisions of the Court also have emphasized that public access enhances the quality of justice because trial participants know their conduct is being observed and because unknown witnesses may come forward. *Richmond Newspapers* at 569, n. 7; *Gannett* at 383. The Massachusetts Court apparently assumed without any record support that at least in sex crimes involving complainants who are minors the opposite is always true. But there is nothing in the record to support the sweeping conclusion that minors always react differently than adults, and certainly there is no basis for concluding other trial participants would act differently solely because the complainant is a child.

Finally, the Court has frequently stated attendance at trials promotes public understanding and informed dis-

cussion of the judicial system. Such understanding is crucial to maintaining the judiciary as a viable institution in our participatory democracy. "When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case. . ." *Richmond Newspapers* at 572. *See also Craig v. Harney*, 331 U.S. 367 (1947). Yet even though "[T]he operations of the Courts and the judicial conduct of judges are matters of utmost public concern," *Landmark Communications, Inc. v. Virginia, supra* at 839, the press and the public were excluded from this entire trial. Consequently, the public has no real understanding of what transpired in this case, and under Massachusetts law the public and the press could be excluded from all such cases.

Despite the holding of this Court in *Richmond Newspapers*, and the array of fundamental interests supporting access articulated in that decision, the Massachusetts Court here dismissed the appeal of the closure[4] of an entire trial where *all participants* wanted the case to be tried in public and no overriding interest supporting closure was articulated in findings by the trial court. As the record shows, the sole basis for the decision was the inflexible legislative mandate of the Closure Statute.[5] It is the

---

4. In Mass. Adv. Sh. (1980) 485, 401 N.E.2d 360 ("Globe I") the court held that the Closure Statute mandates closure of only the testimony of the minor complainant and is permissive with respect to closure of the remainder of the trial. In Globe I permissive closures were left to the "sound discretion of the trial court". In Mass. Adv. Sh. (1981) 1493, 423 N.E.2d 773 ("Globe II") this position was twice repeated but with the observation that such closures would have to comply with *Richmond Newspapers*. Thus, while the entire trial was closed, only the testimony of the minors is automatically closed by the statute.

5. The Massachusetts closure statute ("Closure Statute") provides:

> "At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against

(Continued on following page)

constitutionality of this holding, and that statute, which is at issue here.

B. The Closure Statute Violates the First Amendment Right of the Public and the Press to Attend Criminal Trials Because It Provides for Mandatory Closure of Crucial Trial Testimony

1. The Closure Statute Violates the First Amendment Because It Mandates Exclusion of the Public From Crucial Portions of Criminal Trials Without Requiring Findings by the Trial Court That an Overriding Interest Supporting Closure Has Been Shown

The Closure Statute, as construed by the Massachusetts Court, provides in part for the mandatory exclusion of the public and the press from the courtroom during the testimony of any minor complainant in any trial for a "crime involving sex." This construction of the statute violates the First Amendment right of the public and press to attend criminal trials in two fundamental ways. First, it requires closure irrespective of whether the trial court has made findings compelling closure. Second, there are no compelling or overriding interests that support *mandatory closure* of trials during such testimony.

In *Richmond Newspapers* the Court held that trials may be closed to the public only in the most ex-

---

Footnote continued—

> whom the crime is alleged to have been committed, or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for nonsupport of an illegitimate child, the presiding judge shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case."

M.G.L. c. 278, § 16A.

traordinary circumstances because public attendance serves many fundamental interests protected by the First Amendment. There must be findings by the trial court which show an overriding interest compelling closure, and the closure, if any, may be no broader than necessary to serve that compelling interest. The Closure Statute, as construed, is not so limited. To close the testimony of the minor witnesses, no findings by the trial court are required, or even permitted. The testimony of all minor complainants is closed even where, as here, no interest of any kind is served by such closure. The statute does not permit public attendance even where, as here, the defendant asserts his Sixth Amendment right to a public trial. Public access is not permitted even though the minor complainant and the prosecution want the testimony to be given in public. The statute requires closure without any showing that the minor could not, or would not, testify in open court. The testimony must be closed even where the details of the alleged crime already have been made public. And no consideration is given to the age or maturity of the minor complainant, the nature of the testimony to be given, or the importance of the testimony to the case against the defendant. In short, the statute has been construed to create an absolute ban on access to the testimony of minor complainants' trials of sex offenses.

The mandatory provision of the statute can not be defended on the ground that it requires only that a portion of the trial be closed. Obviously, the "eye witness" testimony of the alleged victim is often the crucial evidence in a criminal trial. In fact, in many cases it may be the only important testimony given in the case. Since the Closure Statute requires exclusion of the public even in these cases, it would in effect frequently close entire trials. Because exclusion of the public from trials of sex

crimes involving minor witnesses undermines all of the fundamental First Amendment interests served by open trials, such interests are also thwarted where the most crucial part of the trial, or virtually all of the trial, is closed. This fact does not mean that portions of a trial may never be closed, but it does show the necessity for case-by-case adjudication of the issue.

Requiring trial courts to take evidence, make findings of fact, and enter an order based upon competent evidence, serves only to insure that these basic interests will not be needlessly frustrated and that only the narrowest and least restrictive orders will be granted. Such requirements are imperative where sensitive First Amendment rights are at stake. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).[6] The Closure Statute goes too far because it gives *no weight* to First Amendment rights and invites the broadest possible infringement. Thus, it violates the teaching of *Richmond Newspapers* and the rudimentary prohibition against overbroad restraints on First Amendment rights.

Even were case-by-case adjudication not required where the First Amendment right to attend trials is at issue, "[D]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake", *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 842, 843-44 (1978); *Whitney v. California*, 274 U.S. 357, 378-79 (1927). Thus, it is appropriate for the Court to consider, as the Massachusetts Court purported to do, the underlying interests asserted in support of the Closure Statute to determine whether

---

6. *See also, Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976); *United States v. O'Brien*, 391 U.S. 367 (1968); TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-20, at 682-88 (1978); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 468 (1969).

they justify infringement of the First Amendment right to attend trials.

A close reading of the Closure Statute and the opinions of the Massachusetts Court reveals that there is no interest, "compelling," "overriding," or otherwise which supports a *mandatory* legislative ban on all testimony by minor complainants. The Massachusetts Court identified five "interests" which it asserted were served by the Closure Statute, 401 N.E.2d 360, 423 N.E.2d 779, but none support a mandatory ban on access. All five of the interests are highly speculative empirical contentions that could be accepted by any court, if at all, only after a proper showing by competent evidence.

The initial claim, that minor witnesses would be more likely to initiate complaints and give testimony if such trials were held in secret, is at best a dubious generality. Very young children may not be able to take such considerations into account, and mature minors may not want to protect the accused from public awareness of his conduct. For example, the complainants here, aged 15, 16, and 17, did not want the accused to be shielded from public scrutiny of his alleged conduct. Securing a society in which sex crimes are acknowledged as unfortunate facts of life, and are known to be treated with care and dignity in judicial proceedings, is more likely to encourage honest complainants than a society which treats such cases as things to be ashamed of and to be properly hidden from the public eye.

The second contention, that exclusion of the public and the press protects minor victims from humiliation and psychological damage is equally questionable. Perhaps a public statement of the details of the crime would be so therapeutic for the long range emotional health of the victim that the transient embarrassment should be of little

concern. There may well be a useful "cathartic effect" to such testimony. Some very young victims may suffer little or no embarrassment by giving such testimony. But again no evidence was heard or considered by the Court on this issue.

The Massachusetts Court's third contention is contrary to general experience. As noted above, public trials tend *to enhance*, not diminish, the quality of and reliability of testimony. While there may be exceptions to this general rule, they would be most likely highly individualized and unrelated to the chronological age of the witness. As a general proposition, it is difficult to see why testimony would become more reliable in the absence of the "checking value" provided by a public forum.

The Massachusetts Court's statements regarding the remaining "interests" also seem to be directly contrary to the general experience of our courts, as noted in *Richmond Newspapers* and other decisions. *Public* trials, not *secret* trials, best promote the sound administration of justice, the preservation of evidence, and the securing of just convictions.

The five interests asserted by the Massachusetts Court actually reduce to two simple "concerns": (1) some minor witnesses may have difficulty giving coherent and accurate testimony about sexual matters in the presence of a large group of strangers in the courtroom; (2) the act of testifying in public about sex crimes is in itself objectionable because it may be embarrassing to certain minor witnesses. For example, if some minors can not give effective testimony because of an inhibiting number of courtroom spectators, then some convictions will not be secured and the orderly administration of justice will be disrupted. If some minor witnesses perceive (apparently in advance) that the act of giving testimony in public

will be embarrassing or humiliating, they may be deterred from filing complaints and, again, convictions may not be obtained. Thus, both "concerns" relate to the asserted psychological effect that giving such testimony may have on individual child witnesses. Such "concerns", being assertedly related to the psychological condition of individuals, would seem to be most appropriately handled in an individualized manner, rather than by broad legislative fiat. In fact, they would seem to require case-by-case adjudication.

The factors that should be considered in determining whether to close to some members of the public any trial testimony of a minor complainant in sex-related crimes would obviously include the age and maturity of the minor, and these will clearly vary in importance from case to case. A second factor to consider would be the nature of the testimony to be given. Obviously, in cases of *attempted* sexual assault, or indecent exposure, there may be little or no "humiliating testimony" to be given; in other cases embarrassment may be similarly minimal. Third, the importance of the testimony to the case must be weighed. Both the accused's right to a public trial and the First Amendment interests in public trials will be eviscerated where the complainant's testimony is the crucial evidence in the trial or where the trial consists essentially of the giving of just that testimony. Finally, the testimony should certainly not be closed where there has been no showing that the witnesses cannot, or will not, give coherent testimony in open court. The witnesses may be either unembarrassed by the testimony or may want to make a public statement of the crimes committed by the Defendant. Thus, even assuming the legitimacy of the interests identified by the Massachusetts Court, they support case-by-case adjudication, but not mandatory legislative closure.

The Massachusetts Court offers no convincing argument against the case-by-case approach. It asserts only that such particularized adjudication would, in and of itself, defeat the state interests closure is intended to serve.

To support this claim, the Massachusetts Court suggests that a full hearing constituting a "side trial" with expert witnesses would be necessary to determine which minor witnesses *really* were unable to testify in public and which were only asserting that proposition. It contends the side trial would not only be "cumbersome", it would force the minor to "relive" the assault, which is just what the statute is intended to prevent. Moreover, the public and the press would want access to this proceeding; thus, the deterrent effect of giving such testimony would be increased since the witness might have to repeat his testimony in two public proceedings.

This argument is misconceived for several reasons in addition to those stated above. First, in complaining that "cumbersome" hearings would be needed, the Massachusetts Court wholly ignores the fact that where a witness affirmatively wants to give public testimony, no hearing would be needed at all. Second, the Court fails to recognize that where First Amendment rights are affected, "cumbersome" hearings are required. The construction adopted by the Massachusetts Court not only gives no weight to the First Amendment right, it ensures that there will be no opportunity to give it weight. Third, by emphasizing the difficulty in separating those who can testify from those who cannot, the Court implicitly concedes testimony could be given by a great many witnesses. Fourth, the Court's position is predicated upon the highly questionable hypothesis that such hearings would require a restatement of the details of the sexual assault. Just as suppression hearings typically deal with the manner in

which evidence is secured, and only rarely require any detailed presentation of the evidence to be suppressed,[7] the hearing here should be limited to the ability of the minor to give coherent testimony, not the testimony he would give. Finally, most courts (*see infra*) have not found it necessary to conduct any such hearings. They have simply placed the witness on the stand to see if she can testify without any restriction on trial attendance. If she cannot give coherent testimony, appropriate steps are taken, and they seldom have included total exclusion of the press and public.

The Massachusetts Court envisions that such hearings, would be "ordeals," but there is no reason to believe that trial judges cannot handle them with the necessary sensitivity. The witness need not "relive" the attack upon her person, nor would she even be required to give testimony beyond the statement that she is unable to testify. Such testimony, properly supported by expert opinion, and subject to countervailing proof, would under appropriate circumstances provide the judge with ample evidence to decide whether or not to close the courtroom.

The Massachusetts Court believed that such hearings would deter testimony, but we respectfully submit it is more plausible to assume that a system that everyone knows will give careful and individualized consideration to the feelings of sex crime victims will encourage more victims to come forward than a system that shrouds such

---

7. As Justice Blackmun noted in *Gannett*, at 442:

> At most [suppression] hearings, the issues concern not so much the contents of a confession or of a wiretap, or the nature of the evidence seized, but the circumstances under which the prosecution obtained this material. Many hearings, with care, could be conducted in public with little risk that prejudicial information would be disclosed.

Accord: *State of Florida ex rel. The Pensacola News-Journal, et al. v. Fleet*, 388 So.2d 1106 (Fla. 1st DCA 1980).

trials in secrecy. Much of the court's argument in Globe I and Globe II is based upon a false dichotomy, that either such testimony must be *always closed* or it must be *always open*. The choice here is actually between mandatory closure and case-by-case adjudication.

There is, however, no reason to conclude that either a concern for securing coherent testimony from minors in sex cases or a concern for protecting minor complainants from embarrassment would support the exclusion of the public and the press even under a case-by-case adjudication.

The concern that some children may find a large crowd of spectators inhibiting, or may embellish their testimony in the presence of a crowd, can be satisfied by limiting the number of spectators (press and public) to an uninhibiting group in order to avoid this potential adverse effect. While that number may be small, courts have traditionally included some members of the press among those allowed to be present (*see infra* at pgs. 21-23). Thus, the First and Sixth Amendment interests in public trials need not be compromised.

The second concern, protection of the minor witness from embarrassment or humiliation, requires some clarification. The embarrassment or humiliation of the minor witness may conceivably stem from two sources, (i) giving testimony relating to intimate sexual assault in the presence of strangers and (ii) the anticipated embarrassment that may come from subsequent news reports of the victim's trial testimony. The former may be handled, as noted above, by limiting the number of spectators at the trial. Moreover, such testimony before a group of strangers is unavoidable at trial since the jury, judge, lawyers, defendants, and assorted court personnel will be present, and embarrassment and humiliation may be more the

product of cross examination or having to testify before the Defendant, than the presence of other strangers.

The concern that the details of the testimony may be published, and that such publication would be embarrassing, is simply not a legitimate basis for closure. Most criminal and civil cases involve testimony that is highly embarrassing to someone. Embarrassment is not an emotion unique to juveniles or sex trials, and it has not been deemed sufficient for closure. For example, the Kentucky Supreme Court recently reversed a trial judge's closure order in a sodomy case involving victims under the age of 12 holding "embarrassment" of minor witness is insufficient for closure. *Lexington Herald Leader Co., Inc. v. Tackett,* 601 S.W.2d 905, 907 (Ky. 1980). *Accord: State v. Schmit,* 273 Minn. 78 (1966). So that . . . "where a child is a witness and is unable to testify coherently before an audience, it is considered permissible for the court temporarily to exclude the public in order that competent testimony be obtained," Note, *The Accused's Right to a Public Trial,* 49 COL.L.REV. 110, 112 (1949), because there is a genuine interference with the fair administration of justice. Second, there is no constitutional right to make secret accusations at trial against a defendant; yet only such a right could outweigh the First and Sixth Amendment rights present. Third, exclusion of the public and the press from trial testimony would not prevent publication of the details of the testimony unless gag orders were also entered and the record sealed. Moreover, there is no reason to believe secrecy will not cause greater embarrassment to witnesses in the long run since inaccurate rumors of the crime may well circulate. *See Nebraska Press Association v. Stuart, supra* at 567. Thus, any attempt to guarantee the secrecy of trial testimony would either fail, be counterproductive, or require institution of

a patently unconstitutional system of censorship of information regarding sex crimes.

There is a more fundamental objection to the overbroad reach of the Closure Statute. Many minor witnesses may, like the witnesses here, want to give their testimony in open court. They may be unembarrassed, or even though embarrassed or humiliated, they may want to place their accusations before a public forum; they may seek retribution or public vindication of their right to be secure in their persons. In such cases, closure serves only to impermissibly silence a "willing speaker." The Closure Statute is overly "paternalistic" and overbroad. It does not protect the minor, it supplants her. In an effort to protect her dignity, it robs her of it by assuming she cannot determine for herself whether she wishes to testify in public. The statute also implicitly endorses the unworthy notion that being the victim of a sexual assault is something to be ashamed of. The Court should not lend such attitudes support.

Nor should the Court endorse the restriction because it believes some members of the public may yet believe that being the victim of a sex crime renders one "unclean", or somehow less desiring of respect, and that those people will not be able to deal rationally with the information that a particular person has been the subject of such an attack. Such an endorsement strikes at the core of the First Amendment because it denies the very commitment to individual dignity the Closure Statute is said to serve. Government may never bar the speech of a willing speaker on the assumption that members of the public cannot be trusted to rationally and fairly evaluate the information he would impart, because that would deny them their fundamental right of "moral autonomy." Scanlon, *A Theory of Freedom of Expression*, 1 PHILOSOPHY AND PUBLIC AFFAIRS 204 (1972); *First National Bank of Boston v. Bellotti, supra*

at 791-92, particularly n. 31. It is not within the power of government to determine what information persons are morally equipped to receive.

The Court itself has roundly condemned such paternalistic legislation as contrary to the fundamental philosophy embodied in the First Amendment. In *Virginia Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 770-71 (1976) the Court held a state may not choose to silence a willing speaker because it is afraid of the reaction the public may have to his statements. The First Amendment precludes such a choice:

> It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us. Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways [citation omitted]. But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering.

Id. More recently, in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), this Court struck down a content-based restriction on "for sale" signs because it was improperly based on the assumption that the public would not act rationally or properly if it knew which houses were being sold to minority families. *Id.* at 496-97. And in *First National Bank of Boston v. Bellotti, supra*, the Court found the public must be deemed capable of evaluating corporate advertising on political issues.

The legislation challenged here is even more paternalistic than that rejected by the Court in the past since it reflects a profound distrust of both the speaker and the potential listeners. That paternalism may not be

justified on the grounds that the speaker is a minor. Minors do not "shed their First Amendment rights" at the courtroom door, any more than at the schoolhouse gate. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

2. There Is No Tradition of Automatically Closed Trials for Sex-Related Offenses

The Massachusetts Court sought to distinguish this case from *Richmond Newspapers* by asserting that there is a "notable exception" from the tradition of public trials for crimes involving sex offenses. This contention is a misreading of the precedents.

Massachusetts is the only state to have enacted a statute mandating closure of any portion of sex trials involving juvenile complainants. In fact, it appears that only a minority of states have passed statutes, promulgated court rules, or enacted constitutional provisions even permitting such closures on a case-by-case basis.[8] No court, other than the Massachusetts Court, has held that the

---

8. Florida is the only other state that has enacted a statute *requiring* the trial court to exclude some members of the public from the courtroom during the testimony of minors under the age of 16 in sex offense cases, but the statute expressly exempts from closure various classes of spectators including "newspaper reporters or broadcasters". FLA. STAT. ANN. §918.16 (West Supp. 1980). Apparently, only thirteen states have enacted permissive closure statutes, court rules, or constitutional provisions. *See* ALA. CODE §12-21-202; ARIZ.R.CRIM.P. 9.3(c); GA. CODE §81-1006; KY.R.CR. 9.50; MISS. CONST. ART. III, §26; NEB. REV. STAT. §28-321; N.H.REV. STAT.ANN. §632-A:8; N.Y.JUD.LAW (McKinney) §4; N.C. STAT. §15-166; S.C. CODE §16-3-660; UTAH CODE ANN. §78-7-4; VA. CODE §19.2-266 (at issue in *Richmond Newspapers, supra*); VT. STAT. ANN. Tit. 12, §1901.

In addition, three states have enacted statutes allowing trial judges to order the videotaping of the testimony of minor witnesses in chambers in lieu of direct testimony in the presence of the jury. *See* ARIZ. REV. STAT. ANN. §12-2312; FLA. STAT. ANN. §918.17 (West Supp. 1980); N.M. STAT. ANN. §30-9-17. Montana has adopted a statute allowing the victim's testimony to be videotaped and later presented to the jury. MONT.REV.CODES ANN. §46-15-401.

public and the press must always be excluded from the courtroom during the testimony of minor complainants in sex crimes, and even the Massachusetts Court did not always so hold. *Commonwealth v. Blondin*, 324 Mass. 564, 87 N.E.2d 455 (1949). All other courts have adopted the approach of case-by-case adjudication in such cases.[9] Perhaps even more significant, most courts have declined to exclude the press and other members of the public having a "direct interest" in the trial even during the testimony of a minor victim of a sex crime.[10]

The actual concern of virtually all of the pertinent case law has been to limit the number, and restrict the conduct, of courtroom spectators to secure coherent and rational testimony of child witnesses at trial.[11] Rather than creating an exception to our tradition of public trials, the courts have done no more than reduce the number of spectators allowed in the courtroom so that they do not inhibit the taking of testimony. The courts have allowed such restrictions on attendance only for the briefest periods of time, and they have seldom completely cleared

---

9. See cases collected at 156 ALR 265, 48 ALR 2d 1436, 62 ALR 2d 509, 31 ALR 3d 816, 39 ALR 3d 852, 59 ALR 3d 1007, 79 ALR 3d 401. *See also* PAUL, SPANIOLO, BOHRER, OVELMEN, *Access*, NINTH COMMUNICATIONS LAW INSTITUTE (1981), at 163-76.

10. *Compare*, *Gannett*, at 430-31 n. 11 (Blackmun, J. concurring and dissenting) *with*, *Gannett*, at 388 n. 19. The overwhelming majority of closure cases do not exclude the press. *See, e.g.*, *People v. Latimore*, 33 Ill.App.3d 812, 342 N.E.2d 209, 313-14 (Ind. 1970); *Riley v. State*, 83 Nev. 282, 429 P.2d 59 (Nev. 1967); *Price v. State*, 496 S.W.2d 103, 107-08 (Tex.Ct.Crim.App. 1973); *Connecticut v. Purvis*, 157 Conn. 198, 251 A.2d 178, 182 (1968), *cert. denied* 395 U.S. 928 (1969); *Moore v. State*, 151 Ga. 648, 108 S.E. 47, 49-53 (Ga. 1921); *Commonwealth v. Blondin*, 324 Mass. 564, 87 N.E.2d 455, 458, 460 (Mass. 1949); *Ex parte Rudolph*, 276 Ala. 392, 162 So.2d 486 (Ala. 1964).

11. *See, e.g.*, *Hogan v. State*, 191 Ark. 437, 86 S.W.2d 931 (1935); *State v. Damm*, 62 S.D. 123, 252 N.W. 7 (1934); and *Beauchamp v. Cahill*, 297 Ky. 505, 180 S.W.2d 423 (1944).

a courtroom. Orders limiting attendance are extraordinarily rare even under these circumstances, and characteristically have been entered only after the witness was unable to give coherent testimony in court.[12] In so limiting the number of spectators, the courts have been particularly concerned that some representatives of the press be among those allowed to remain in the courtroom at all times in order to help preserve the defendants' right to a public trial. Thus, precedent in this area recognizes, as has the Court, that the press frequently functions as a "surrogate" for unfettered trial attendance by the general public. *Richmond Newspapers*, at 573, 581 n. 18 and 586 n. 2 (Brennan, J., concurring). The opinion of the Massachusetts Court is unprecedented in American law.

None of the six decisions relied upon by the Massachusetts Court as establishing its "exception" to the tradition of public trials even suggest mandatory closure is proper.[13] In three of these cases, members of the press were specifically exempted from the closure order, and the exclusion of some members of the public in those cases was in large part justified by the fact the press was allowed to remain in court. *United States ex rel. Latimore v. Sielaff, supra; Douglas v. State, supra; Price v. State, supra.* The remaining cases recognize only that upon a proper showing some narrow restrictions may be placed on public attendance at trials of sex crimes against minors.

---

12. *See, e.g., Geise v. United States*, 262 F.2d 151 (9th Cir. 1958), *cert. den.* 361 U.S. 842 (1959); *State v. Callahan*, 100 Minn. 63, 110 N.W. 342 (1907).

13. The cases are *United States ex rel. Latimore v. Sielaff*, 561 F.2d 691 (7th Cir. 1977), *cert. denied* 434 U.S. 1076 (1978); *Harris v. Stephens*, 361 F.2d 888 (8th Cir. 1966), *cert denied sub nom. Harris v. Bishop*, 386 U.S. 964 (1967); *Benedict v. People*, 23 Colo. 126, 46 P. 637 (1896); *Douglas v. State*, 328 So.2d 18 (Fla. 1976), *cert. denied* 429 U.S. 871 (1976); *State v. Callahan* 100 Minn. 63, 110 N.W. 342 (1907); *Price v. State*, 496 S.W.2d 103 (Tex.Ct.Crim.App. 1973).

C. The Closure Statute Violates the First Amendment Because It Authorizes the Discretionary Closure of Trials

1. Adoption of a Discretionary Standard for Closure Violates the First Amendment Right of the Public and the Press to Attend Criminal Trials

In Globe I, the Massachusetts Court held that the Closure Statute, in addition to its mandatory exclusion of the public and the press from the testimony of the minor complainant, left to the "sound discretion" of trial courts the decision to close the remaining portions of such sex trials. 401 N.E.2d at 371. In Globe II, the Massachusetts Court declined to provide any guidance regarding the "discretionary" closure of trials beyond an assertion that any justification for closure "must comply with the standards of *Richmond Newspapers.*" 423 N.E.2d at 781; 423 N.E.2d at 779, n. 13. But the Massachusetts Court did not acknowledge that *Richmond Newspapers* precludes leaving closure decisions to the "sound discretion" of trial courts. The protection of fundamental rights is not a matter to be left to "discretion."[14] As Justice Brennan explicitly noted in *Richmond Newspapers,* at 598 a statute which "authorizes trial closures at the unfettered discretion of the judge and parties . . . violates the First and Fourteenth Amendments. . . ."

---

14. The Court has frequently struck down legislative acts impinging upon First Amendment rights solely because they vest "discretion", *e.g., Shuttlesworth v. City of Birmingham,* 397 U.S. 147 (1969); *Staub v. City of Baxley,* 355 U.S. 313 (1958).

2. The Court Should Adopt a Standard for Closure Requiring That Movants Seeking to Exclude the Public and the Press From Criminal Trials Must Make an Evidentiary Showing That (i) Access Would Cause Irreparable Harm to a Subordinating State Interest Which Is Compelling; (ii) All Alternatives to Closure Less Intrusive of First Amendment Rights Have Been Exhausted; (iii) the Closure Order Sought Is No Broader Than Necessary to Serve That Interest; and (iv) Closure Will Succeed in Serving That Interest

Only thirty-three years ago the Court observed, "Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." *In Re Oliver*, 333 U.S. 257, 266 (1948). Sadly, such a statement is no longer true. In the two and one-half years since *Gannett* literally hundreds of judicial proceedings, including some trials, have been closed to the public.[15] The state appellate courts and lower federal courts have been deluged with closure motions and appeals from orders granting closure. Even a cursory review of this new and vast case law shows the courts have been thrown into great confusion and doubt as to the proper standards and procedures which at a minimum must be observed to protect the First Amendment right to attend trials. In *Richmond Newspapers*, this Court acted to halt the explosion of unjustified closure cases, and began the process of developing standards for adjudicating motions to close trials. But the recent case law reveals

15. The Reporters Committee For Freedom Of The Press maintains a compilation of court closures. Many of the cases are collected in PAUL, COMMUNICATIONS LAW, *supra*, at 129-298.

state court systems are still beset by a glut of closure motions and further clarification by the Court is still urgently needed.[16] For this reason, direction from the Court as to the proper procedural safeguards and standards for adjudicating motions seeking to close trials would be greatly welcomed by the press, bench, and bar.

The Court has made it abundantly clear in many opinions that the protection of First Amendment interests requires especially stringent procedural safeguards.[17] Thus, the law of access should meet the Court's basic requirement that procedures affecting First Amendment interests exhibit "the necessary sensitivity to freedom of expression." *Freedman v. Maryland, supra* at 58.

The most rudimentary requirement of "First Amendment Due Process" is that there be a hearing upon fair notice prior to entry of any order impinging on First Amendment rights. *Carroll v. President and Commissioners of Princess Anne, supra; Marcus v. A Search Warrant of Property*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). Many courts, including the Massachusetts Court, have recognized the necessity for

---

16. PAUL, COMMUNICATIONS LAW, *supra* at 226-247 (collecting and digesting the confused welter of state appellate and federal decisions decided since *Richmond Newspapers*).

17. Monaghan, *First Amendment Due Process*, 83 HARV. L.REV. 844 (1970); TRIBE, AMERICAN CONSTITUTIONAL LAW, §12-34, §12-35, §12-36 (1978); *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968) (injunctions affecting First Amendment interests must follow adversary hearings whenever practicable); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957) (contempt adjudication may not be based on *ex parte* order if underlying injunction restraining expression is substantively invalid); *Speiser v. Randall*, 357 U.S. 513, 520-21, 529 (1958) (statutory procedure for tax exemption shifted burden of proof in favor of suppression of speech thereby violating due process requirements protecting First Amendment rights); *Freedman v. Maryland*, 380 U.S. 51 (1965) (presumption in favor of First Amendment interests unconstitutionally shifted by state censorship system).

this procedural safeguard where closure is sought.[18] Five members of the Court in *Gannett* recognized the need for a hearing prior to closure in the context of a motion to close a pretrial suppression hearing, *Gannett*, at 401 (Powell, J., concurring); *Id.* at 441-43 (Blackmun, J., concurring and dissenting), and the requirement of the Court in *Richmond Newspapers* that closure be granted only when based on findings made by the trial court can only be read as contemplating a full evidentiary hearing prior to closure. The Court should make this requirement explicit.

At the hearing, the movant seeking closure of a trial should be required to shoulder the burden of proof since the Court has determined that trials are presumptively open to the public and because any other allocation of the burden of proof could cause First Amendment rights to be wrongly infringed. *Speiser v. Randall, supra* at 525-26.

The most important standard requiring some clarification by the Court is the substantive standard or "burden" that a movant seeking closure of a trial should be required to meet. In *Gannett*, four members of the Court stated that closure of a suppression hearing should be granted only where the movant has shown with competent evidence (i) "that there is a substantial probability that irreparable damage to his fair trial right will result from conducting the proceeding in public," *Gannett*, at 441; (ii) that "the accused should show a substantial

---

18. *Sacramento Bee v. United States District Court*, 656 F.2d 477 (9th Cir. 1981); *In Re United States ex rel. Pulitzer Pub. Co.*, 635 F.2d 676 (8th Cir. 1980); *State v. Green*, 395 So.2d 532 (Fla. 1981); *Ashland Publishing Co. v. Asbury*, 612 S.W.2d 749 (Ky.Ct.App. 1980); *People v. March*, 95 Ill.App.3d 46 (1981); *Patuxent Publishing Corp. v. State*, 48 Md. App. 689, 429 A.2d 554 (Md. 1981); *Detroit Free Press v. Recorder's Court Judge*, 409 Mich. 364, 294 N.W.2d 827 (1980); *State v. Sinclair*, 274 S.E.2d 411 (S.C. 1980); *State v. Wahle*, 298 N.W.2d 795 (S.D. 1980).

probability that alternatives to closure will not protect adequately his right to a fair trial", *Id.;* and (iii) the "accused should demonstrate that there is a substantial probability that closure will be effective in protecting against the perceived harm." *Id.* at 442. Justice Powell recommended only a slightly different test for such pretrial closure motions. *Id.* at 400.

Both of these standards are somewhat less stringent than the standard which should be adopted as appropriate for adjudicating trial closures. The standards suggested in *Gannett* speak in terms of a "substantial probability" or "likelihood" of prejudice because they deal with *pretrial* proceedings which inherently involve some degree of *prediction* as to the prejudicial effect access to certain information might ultimately have on persons selected as jurors at trial. Some courts have required a more stringent showing than either "substantial probability" or "likelihood" of prejudice—the showing of a "serious and imminent threat" to the "fair administration of justice"—because they have deemed the interests in preserving access to most pretrial proceedings to be as strong as those supporting access to trials, and that effective alternatives to closure are readily available in the pretrial stages of the prosecution.[19] But each of these standards is predictive in nature and varies only in the imminency and certainty of the harm required to justify closure. When a case has reached the trial stage there is little need to speak in terms of predictions, probabilities, or "threats"—"imminent" or otherwise. Either public attendance does irreparable harm, or it does not. More particularly, either the witness is able to testify before a crowd of strangers or she can't.

---

19. *See, e.g., Ocala Star Banner Corp., et al. v. Sturgis,* 388 So.2d 1367 (Fla. 5th DCA 1980); *State of Florida ex rel. The Pensacola News-Journal, et al. v. Fleet,* 388 So.2d 1106 (Fla. 1st DCA 1980).

Because the interests supporting closure may well include the need to protect information vital to national security, the standard for closure cannot be expressed simply in terms of damage to Sixth Amendment rights. Thus, movant seeking closure should prevail only where access would do irreparable harm to "a subordinating interest which is compelling." *First National Bank of Boston v. Bellotti, supra* at 786 (and cases cited therein), and a showing of *direct harm* to such an interest must be made on a case-by-case basis.

Similarly, at trial there are either alternatives to closure, or they have been exhausted. Therefore, the movant seeking closure should be required to show the alternatives have been exhausted.

In addition, the burden should be on the movant to demonstrate that the closure order sought is no broader in scope or duration than necessary to achieve its legitimate ends, and that it will succeed in preventing the harm to that interest. *First National Bank of Boston v. Bellotti, supra* at 785; *Elrod v. Burns*, 427 U.S. 347 (1976); *Buckley v. Valeo, supra* at 25; *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963). Consequently where closure is ordered it should apply only to the testimony which would do the harm and should explicitly provide for release of the transcript of that testimony as soon as the need for closure has passed. The test for trial closure should be whether the movant has shown with competent evidence that

(i) public attendance would do irreparable damage to a constitutionally subordinating state interest which is compelling;

(ii) there are no available alternatives to closure less intrusive of First Amendment rights;

(iii) that the closure order sought is no broader than necessary to serve that interest, and

(iv) that entry of the closure order sought will succeed in serving that interest.

In short, no order closing any portion of any trial should be granted unless that order is "strictly and inescapably" necessary to protect a constitutionally subordinating state interest which is compelling, such as the Sixth Amendment rights of the accused or national security interests.

CONCLUSION

For the foregoing reasons, the judgment of the Massachusetts Court should be reversed.

PAUL & THOMSON
DAN PAUL
RICHARD J. OVELMEN
1300 Southeast First National Bank Building
Miami, Florida 33131
(305) 371-2000
Attorneys for Amici Curiae

APPENDIX

The Miami Herald Publishing Company, a division of Knight-Ridder Newspapers, Inc., publishes The Miami Herald which has a daily circulation of 421,236.

The Nebraska Press Association is a Nebraska corporation operating as the business and professional association representative for 218 Nebraska newspapers, including 20 dailies and 198 weaklies.

Media of Nebraska is an unincorporated Nebraska professional association comprised of the Nebraska Press Association, Nebraska Broadcasters Association (representing broadcasters in 54 AM and 29 FM radio and 15 television stations in Nebraska); the Nebraska Daily Publishers Association (representing 20 dailies in Nebraska); the Journal-Star Printing Company (publisher of The Lincoln Star; circulation 31,700), Lincoln Journal (circulation 44,300), and the Sunday Journal and Star (circulation 72,900); and The World-Herald Corporation (publisher of the Omaha World-Herald; Sunday circulation 274,000, and daily circulation 226,000). The purpose of this Association is to represent the First Amendment interests of the Nebraska media and the Nebraska public.

The Oklahoma Publishing Company publishes The Daily Oklahoman and the Oklahoman City Times, daily newspapers in Oklahoma City, Oklahoma, and the Colorado Springs Sun, a daily newspaper in Colorado Springs, Colorado. Its wholly-owned subsidiaries Gaylord Broadcasting Company and Gaylord Broadcasting Company of Ohio operate seven television broadcast stations and three radio broadcast stations in the United States.

Landmark Communications, Inc. publishes The Virginian-Pilot and The Ledger-Star, morning and afternoon

newspapers of general circulation in the cities of Norfolk, Virginia Beach, Chesapeake, Portsmouth, and Suffolk. Its wholly-owned subsidiaries publish the Greensboro Daily News and The Greensboro Record, morning and afternoon newspapers of general circulation in Greensboro, North Carolina and The Roanoke Times and World News, an all-day newspaper of general circulation in Roanoke, Virginia. Landmark's community newspaper subsidiaries publish 26 newspapers in nine states.

Daily Mail Publishing Co. is publisher of the Charleston Daily Mail in Charleston, West Virginia.

Dailey Gazette Co. is publisher of the Charleston Gazette in Charleston, West Virginia.

Gannett Co., Inc. is a nationwide, diversified communications company, with newspaper, television, radio, outdoor advertising and magazine members, as well as news, marketing, research and film production services in 35 states, the two U.S. territories of the Virgin Islands, Guam and Canada. Gannett newsrooms operate in 37 states, Guam and the Virgin Islands, in addition to the Gannett News Service, which is headquartered in Washington, D.C. Gannett continually expresses interest in maintaining access to information important to the effective operation of a democracy.

Richmond Newspapers, Inc. publishes the Richmond Times-Dispatch (circulation 137,633), and The Richmond News Leader (circulation 114,420), with the Sunday Times Dispatch (circulation 222,506).

Dow Jones & Company, Inc., a Delaware corporation with principal executive offices in New York, is the publisher of, *inter alia*, The Wall Street Journal, the largest circulation daily newspaper in the United States. Through Ottaway Newspapers, Inc., a wholly-owned subsidiary,

Dow Jones also publishes 20 daily community newspapers in various parts of the country, including six in the Commonwealth of Massachusetts.

The Los Angeles Times, a division of the Times Mirror Company, is a newspaper with a daily circulation of 1,036,522 in Los Angeles, California.

Advance Publications, Inc. (Newhouse Newspapers) owns and operates 29 newspapers located in 11 states. Among those newspapers are The Morning Union, The Evening Daily News and The Sunday Republican which are published in Springfield, Massachusetts and circulated throughout western Massachusetts.

Field Enterprises, Inc. publishes the Chicago Sun-Times, a newspaper with a daily circulation of 649,340 and a Sunday circulation of 681,904.

The Detroit Free Press is a daily newspaper published in Detroit, Michigan and distributed throughout the state, with a daily circulation of 604,062.

Newsday is a daily newspaper published in Long Island, New York with a daily circulation of 507,350.

The Philadelphia Inquirer is a daily newspaper published in Philadelphia, Pennsylvania with a daily circulation of 425,877.

The Des Moines Register and Tribune Company is in the news and communication business and publishes the following newspapers: The Des Moines Register; the Des Moines Sunday Register; the Des Moines Tribune; the Jackson Sun (Tennessee); the Waukesha Freeman (Wisconsin); the Independence Conservative (Iowa); and the Independence Bulletin-Journal. The Company also is the owner of five television and radio stations in Illinois, Wisconsin, Colorado, Oregon and Hawaii.

The Indianapolis Star is a morning newspaper with a daily circulation of 220,944 and The Indianapolis News is an afternoon newspaper with a circulation of 143,166. Both newspapers are published by Indianapolis Newspapers, Inc.

The Courier-Journal and Louisville Times Company publishes the Courier-Journal (circulation 208,150), The Louisville Times (circulation 161,681), and The Courier-Journal & Times (Sunday circulation 345,052).

The Arizona Republic is a morning newspaper whose daily circulation is 237,193 and the Phoenix Gazette is an evening newspaper whose daily circulation is 101,213. Both newspapers are published by Phoenix Newspapers, Inc.

The Seattle Times Company publishes the largest daily circulation newspaper in the Pacific Northwest with a daily circulation of approximately 254,053 and a Sunday circulation of 333,350.

The Tribune Company, a subsidiary of Media General, Inc., publishes The Tampa Tribune (circulation 190,898) and The Tampa Times (circulation 24,942).

The Bergen Evening Record Corporation publishes The Record (circulation 155,000) and the Sunday Record (circulation 202,000).

The San Jose Mercury is a morning newspaper with a daily circulation of 159,512 and the San Jose News is an afternoon newspaper with a daily circulation of 66,464.

The News and Sun-Sentinel Company publishes The Fort Lauderdale News, an afternoon newspaper with a daily circulation of 95,836 and The Sun-Sentinel, a morning newspaper with a daily circulation of 74,847.

Chesapeake Publishing Corporation (Chesapeake) publishes one daily, four twice-a-week and ten weekly newspapers serving suburban and rural Maryland and Delaware. The combined paid circulation for these papers is approximately 85,600. Chesapeake, as part of its responsibility to its readers, constantly monitors judicial proceedings for newsworthy information.

Associated Press is a non-profit mutual news cooperative engaged in collecting and disseminating general news of local, national and international importance. It is organized as a not-for-profit corporation under the laws of the State of New York and its members include newspapers and television and radio stations. Thus, Associated Press has a vital interest in protecting the right of the press to gather and publish news.

American Newspaper Publishers Association (ANPA) is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States. The Boston Globe and 43 other newspapers published in various parts of Massachusetts hold membership in ANPA. The Association is concerned with issues of general significance to the profession of journalism and the newspaper publishing business. ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns. The Association's member newspapers, individually and through ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Society of Professional Journalists, Sigma Delta Chi is a voluntary, not-for-profit organization of 28,000 members representing every branch and rank of print and broadcast journalism. It is the largest, oldest, and most representative organization of journalists in the United States. Among the Society's purposes are its commitments to ensure that the public's business be conducted in public and to keep governmental proceedings, including court hearings, open to public inspection. Members of the Society regularly prepare news reports about the administration of justice, including reports about criminal prosecutions for rape.

The National Newspaper Association is a trade association consisting of more than 5,500 weekly and daily newspapers located throughout the United States. A major purpose of the Association is to preserve the constitutional guarantee of freedom of the press for community newspapers.

New England Newspaper Association is a regional organization representing 90 daily newspapers in Massachusetts, Maine, New Hampshire, Vermont, Rhode Island and Connecticut. Its major purpose is to gather and dissem-

inate information and to provide services in all aspects of the newspaper business.

Southern Newspaper Publishers Association is an organization of daily newspapers in 14 states including Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia. Approximately 450 daily newspapers are members of the Association, representing virtually all the daily newspapers in the region.

The Alabama Press Association is the trade association for the newspaper publishers in the State of Alabama. Its membership is comprised of 135 members who publish nearly every daily and weekly newspaper in the state. The members are vitally affected by the decision in this case as it may relate to their ability to gather information and report fully and accurately concerning persons involved in criminal proceedings.

Massachusetts Newspaper Publishers Association is an organization of 41 daily and 28 weekly newspapers. Its principal function is to monitor the state legislature and the judicial system for developments which affect the newspaper business and press freedom.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Brief of Amici Curiae was served by mail this 7th day of January, 1982, upon the following:

Mitchell J. Sikora, Jr.
Assistant Attorney General
Chief, Government Bureau Litigation
John W. McCormack State Office Building
One Ashburton Place
Boston, Massachusetts 02108

James F. McHugh
Bingham, Dana & Gould
35th Floor
100 Federal Street
Boston, Massachusetts 02110

RICHARD J. OVELMEN

Amicus Brief

3

No. 81-611

Office - Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GLOBE NEWSPAPER COMPANY,

Appellant,

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF THE NATIONAL BROADCASTING COMPANY, INC. AS *AMICUS CURIAE*

HOWARD MONDERER
National Broadcasting Company, Inc.
4001 Nebraska Avenue NW
Washington, D. C. 20016
(202) 686-4015

Attorney for
National Broadcasting Company, Inc.

Of Counsel:

JAY GERBER
Vice President, Law

BARBARA G. HERING
Senior Counsel
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, New York 10020

December 31, 1981

TABLE OF CONTENTS

PAGE

Consent of the Parties 1

Opinions Below, Jurisdiction, Statute and Statement .. 2

Constitutional Provision Involved 2

Question Considered in This Brief 2

Interest of *Amicus Curiae* 2

ARGUMENT—

A state statute cannot consistent with the First Amendment and *Richmond Newspapers* mandate closure of any part of a trial without provision for hearing and articulated findings of overriding public interest 3

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Collin v. *Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978) 4

Globe Newspaper Co. v. *Superior Court*, 401 N.E.2d 360 (Mass.), *remanded*, 101 S.Ct. 259 (1980) 5-6

Globe Newspaper Co. v. *Superior Court*, 423 N.E.2d 773 (Mass. 1981) 3, 5, 6

Richmond Newspapers v. *Virginia*, 448 U.S. 555 (1980) 2, 3, 4, 5

PAGE

Smith v. *Daily Mail Publishing Co.*, 443 U.S. 97 (1979) 4

Thomas v. *Collins*, 323 U.S. 519 (1944) 4

Constitution:

U. S. Constitution First Amendment 2

No. 81-611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GLOBE NEWSPAPER COMPANY,

Appellant,

v.

THE SUPERIOR COURT FOR THE COUNTY OF NORFOLK,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF OF THE NATIONAL BROADCASTING COMPANY, INC. AS *AMICUS CURIAE*

This brief is submitted on behalf of National Broadcasting Company, Inc. ("NBC"), as *amicus curiae* in support of the position of appellant, Globe Newspaper Company, that the judgment entered against it by the Supreme Judicial Court for the Commonwealth of Massachusetts violates the First Amendment of the United States Constitution.

Consent of Parties

All the parties to the proceedings below have given their consent to the filing of this brief and their letters of consent are on file with the Clerk of this Court.

Opinions Below, Jurisdiction, Statute and Statement

NBC adopts the material set forth in the equivalent sections of the brief of Globe Newspaper Company.

Constitutional Provision Involved

The First Amendment of the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Question Considered in This Brief

Whether the rights of the press and public under the First Amendment as determined in *Richmond Newspapers* are violated by a state statute which requires courts to exclude the press and public from part of a trial without providing for a hearing to determine whether the "presumption of openness" is overcome in the circumstances of the particular case.

Interest of *Amicus Curiae*

NBC News, a division of NBC, is a news-gathering organization which prepares news and other informational programming on matters of public interest and concern which it furnishes to radio and television stations for broadcast in communities across the country.

NBC believes that a statute of the kind upheld in the opinion on review would seriously violate First Amendment rights. It would require closure without a hearing and finding of overriding public interest. We believe that

without these procedural safeguards, this would be an impermissible interference with news gathering and curtail the information flow to the public.

ARGUMENT

A state statute cannot consistent with the First Amendment and *Richmond Newspapers* mandate closure of any part of a trial without provision for hearing and articulated findings of overriding public interest.

The narrow, but vitally important issue addressed by this brief has been clearly if implicitly decided adversely to the appellee in *Richmond Newspapers* v. *Virginia*, 448 U.S. 555 (1980). The Court held that the Constitutional presumption of openness of trials could be rebutted only by a showing of an overriding interest, articulated in findings, justifying denial of the public's First Amendment right of access to criminal trials. Appellee concedes as much, but attempts to bring itself within the rule. It points to the legislative purposes enumerated in the opinions in *Globe Newspaper Co.* v. *Superior Court*, 423 N.E.2d 773 (Mass. 1981), Jurisdictional Statement, p.57a (*Globe II*)* as constituting the findings of overriding public interest required by this Court's decision in *Richmond Newspapers*.

The Virginia statute challenged in *Richmond Newspapers* permitted closure on the unfettered discretion of the trial judge. The Massachusetts statute before this Court requires closure in three factual situations, leaving no discretion whatever in the trial court. Both statutes, however, share a common vice. They fail to provide for a

---

* Citations hereinafter are to the Jurisdictional Statement (J.S. p. ——).

hearing and articulated findings which this Court held in *Richmond Newspapers* rendered the Virginia statute invalid as a violation of First Amendment rights of access to courts.

The Massachusetts courts' findings that the statute on review is supported by "significant state interests" do not satisfy the hearing requirement of *Richmond Newspapers*. Those interests, deduced from legislative history—to shield certain victims of sex crimes from having to testify in public and to protect children—are statements of general policy. However, more is required where First Amendment rights are at issue. *Thomas* v. *Collins*, 323 U.S. 519, 530 (1944), *accord, Collin* v. *Smith*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). *See also Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 101-02 (1979).

The interpretation urged by appellee would make a sham and illusion out of the presumption of openness for judicial proceedings. It would permit the presumption to be overcome whenever a legislative body passed a law closing trials in entire classes of cases on a legislative finding that closure would generally serve the public interest, without allowing any discretion in the trial court to weigh the special circumstances of particular cases.

The Massachusetts statute on review illustrates the dangers inherent in such a rule. It orders closure of courts not only when minors are testifying about sexual crimes committed on or with them, but also in two other situations, without express reference to the age of the witness. The first is "the trial of a complaint or indictment for getting a woman with child out of wedlock", the second is "trials for non-support of an illegitimate child".

Whether these expressions of legislative policy are sound, like every generalization, it is subject to excep-

tions. Moreover, the validity of legislative findings rests on their factual basis. Findings which were valid when made, may well be on an infirm foundation by the time of the trial. The Massachusetts statute on review was enacted in 1923, more than 50 years before the trial in this case. It is common knowledge that sexual and other social mores have greatly changed since that time. Under *Richmond Newspapers* the trial court weighing all the facts in the case before it must make the ultimate determination as to closure. It by no means follows that closure is always justified whenever one testifies or that exclusion of press as well as general public is required.

In the past, as the cases cited in *Globe II* show, J.S. pp. 65-66a, some courts have been closed during such testimony, others have admitted both public and press, while still others have admitted the press although excluding the general public. A hearing and articulated findings are the indispensible means—and indeed the only means which are constitutionally permissible—of providing a sound basis for ordering—or denying—partial or total closure.

This statute, however, precludes the trial judge from considering special circumstances. The Massachusetts court could not, therefore, consider the uncontested fact that neither the defendant, nor the minor witnesses* or the prosecutor (or guardian) on behalf of the minor sought closure. To the contrary, the defendant asked that the trial be kept open and the prosecutor informed the trial judge that the minor witnesses were willing to testify in open court. *Globe Newspaper Co.* v. *Superior Court*, 401 N.E.2d

---

* The minors' required that the press agree not to publish the minors' names, personal data, or photographs and not to try to interview them. The validity of the conditions are not in issue and, of course, not conceded.

360, 363 (Mass.) (*"Globe I"*), *remanded*, 101 S. Ct. 259 (1980), J.S. p. 27a.

The court, however, because it read the statute as mandatory, held that the minor could not waive its protection. *Globe II*, J.S. p. 41 and footnote. In consequence it sanctioned the concrete abridgement of the vital First Amendment rights of access to the trial in progress without a hearing and without any showing—indeed without any assertion by any interested person—of overriding public interest in its closure solely on the basis of an abstract policy judgment of a half century earlier.

To permit legislatures to carve out exceptions to the presumption of openness without the safeguards of a judicial hearing and findings would erode the presumption of openness and deprive it of force and effect in assuring access to courts for press and public.

CONCLUSION

We urge the Court to reverse the decision of the Supreme Judicial Court for the Commonwealth of Massachusetts as an impermissible infringement of rights protected by the First Amendment.

Dated: New York, New York
December 31, 1981

Respectfully submitted,

HOWARD MONDERER
National Broadcasting Company, Inc.
4001 Nebraska Avenue NW
Washington, D. C. 20016
(202) 686-4015

Attorney for
National Broadcasting Company, Inc.

Of Counsel:

JAY GERBER
Vice President, Law

BARBARA G. HERING
Senior Counsel
National Broadcasting Company, Inc.
30 Rockefeller Plaza
New York, New York 10020

Amicus Brief

4

Office - Supreme Court, U.S.
FILED
DEC 31 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GLOBE NEWSPAPER COMPANY,
Appellant,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

Brief Amicus Curiae Of THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS In Support of Appellant

Of Counsel:

Jack C. Landau
Judy D. Lynch
Clemens P. Work

The Reporters Committee
for Freedom of the Press
1125 15th Street, N.W.
Washington, D.C. 20005

E. Barrett Prettyman, Jr.
(Counsel of Record)
Hogan & Hartson
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4500

Attorney for Amicus Curiae

THE CASILLAS PRESS, INC. - 1717 K Street N. W. - Washington, D. C. - 223-1220

QUESTION PRESENTED

Whether it is permissible under the First and Sixth Amendments for a state to always require automatic closure of certain portions of sex-related criminal trials without any notice to or hearing for the public and the press and without any finding that closure is strictly and inescapably necessary, in each particular case, to avoid an egregious miscarriage of justice?

INDEX

Page

STATEMENT OF INTEREST.....2

STATEMENT OF FACTS 3

ARGUMENT

I. Introduction 6

II. The First Amendment Right To Attend Criminal Trials Prohibits Automatic Closure of Trials Involving Sex-Related Crimes, In Whole Or In Part, And No Closure Is Permitted Unless It Is Strictly And Inescapably Necessary To Avoid An Egregious Miscarriage Of Justice.....7

III. Prior To Closure of Any Criminal Trial or Portions Thereof, There Must be Notice and a Hearing to Assess the State's Asserted Interests In Avoiding an Egregious Miscarriage of Justice and to Ensure That Closure is the Least Drastic Means Available to Achieve This Interest.....19

IV. The Sixth Amendment Right To A Public Trial Prohibits Automatic Closure of Such Trials.....24

Table of Citations

Cases:

Barrows v. Jackson,
346 U.S. 249 (1953).....25

Branzburg v. Hayes,
408 U.S. 665 (1972).....8

Carroll v. President and Commissioners
of Princess Ann, 393 U.S. 175
(1968).....20

CBS Inc. v. Young
522 F. 2d 234 (6th Cir.
1975).....12

Commonwealth v. Marshall,
356 Mass. 432, 253 N.E.2d 333
(1969).....11, 14n.3

Craig v. Boren, 429 U.S. 190
(1976).....25

Eisenstadt v. Baird, 405 U.S. 438 (1972).....25

Freedman v. Maryland, 380 U.S. 51 (1965).....20

Gannett Co. v. DePasquale, 443 U.S. 368 (1979).....17, 25, 27

Gooding v. Wilson, 405 U.S. 518 (1972).....9n.1

Herald Ass'n Inc. v. Ellison, 138 Vt. 529, 419 A.2d 323 (1980).....21n.6

In re Oliver, 333 U.S. 257 (1948).....14

Linmark Associates Inc. v. Willingboro 431 U.S. 851 (1977).....9n.1

NAACP v. Alabama ex. rel. Flowers, 377 U.S. 288 (1964).....17, 19

NAACP v. Alabama ex rel. Patterson,
357 U.S. 449 (1958).....9n.1

NAACP v. Button, 371 U.S. 415 (1963).....9n.1

Nebraska Press Ass'n v. Stuart,
427 U.S. 539 (1976).....17, 25, 29

Patuxent Publishing Corp. v. State,
48 Md. App. 689,
429 A.2d 554 (1981).....21n.6

Richmond Newspapers Inc. v. Virginia,
448 U.S. 555 (1980).....passim

Shelton v. Tucker,
364 U.S. 479 (1960).....19

Singelton v. Wulff,
428 U.S. 106 (1975).....25

Smith v. Organization of Foster Families
431 U.S. 816 (1977).....19

State v Sinclair,
274 S.E.2d 411 (S.C. 1981).....21n.6

State v. Green,
395 So.2d 532 (Fla. 1981).....21n.6

Constitutional Provisions:

FIRST AMENDMENT.....passim

SIXTH AMENDMENT.....passim

Miscellaneous:

3 Blackstone, Commentaries.....27

Friendly and Goldfarb, Crime and Publicity: The Impact of News on the Administration of Justice (New York: The Twentieth Century Fund, 1967).....29

McKay, The Preference For Freedom 34 N.Y.U. L. Rev. 1182 (1959).....20

Note, The Rights to a Public Trial in Criminal Cases, 41 N.Y.U. L. Rev. 1138 (1966).....28

Schwatrz, B., The Bill of Rights: A Documentary History (1971).....28

Story, J., Commentaries On The Constitution of The United States (unabr. rep. 1970) (1st ed. Boston 1883).....28

Weihofen, H., The Urge To Punish (1956).....11

NO. 81-611

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

GLOBE NEWSPAPER COMPANY,

Appellant,

v.

THE SUPERIOR COURT FOR THE
COUNTY OF NORFOLK,

Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH OF MASSACHUSETTS

Brief Amicus Curiae Of
THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS
In Support Of Appellants

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is filing as Amicus Curiae with the consent of all parties to this action.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to defending the First Amendment and Freedom of Information interests of the public in knowing about the operation of government, through its press.

As this Court knows, this Amicus has appeared before this Court in virtually every recent case challenging restrictions on the collection and publication of information about court proceedings, including:

Times-Picayune Publishing Corp. v. Schulingkump, 419 U.S. 1301 (1974);
Newspapers Inc. v. Blackwell, 421 U.S. 997 (1975);
Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976);
Gannett Co. v. DePasquale, 443 U.S. 368 (1979); and
Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980).

STATEMENT OF THE FACTS

Amicus adopts the appellant's statement of the facts and summarizes them as follows:

On April 19, 1979, at the beginning of the criminal trial of Albert Aladjem for three counts of rape, Commonwealth v. Aladjem, Norfolk Superior Court Criminal No. 73102-9, the trial judge ordered the courtroom to be closed to the general public. The judge entered this order pursuant to a Massachusetts statute, M.G.L. c. 278 Sec. 16A which provides:

> At the trial of a complaint of indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed or at the trial of a complaint or indictment for getting a woman with child out of wedlock, or for the non-support of an illegitimate child, the presiding justice shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case.

Counsel for the Appellant, Globe Newspaper Company, (Globe), then filed a motion to revoke orders concerning exclusion of the press from the trial and a motion for a hearing with

respect to any orders excluding the press from the trial. (App. 5a,6a). The trial judge denied these motions, ruling that the "trial will be conducted in such a manner that the general public shall be excluded from the courtroom, including the press, and that only such persons as may have a direct interest in the case will be permitted in the courtroom." (App. 10a).

The defendant objected to this ruling (App. 11a), and the prosecutor stated that the Commonwealth had not requested the exclusionary order. (App. 11a)

The trial judge gave no notice to the public or to the press prior to closing the courtroom, and he held no hearing to determine the necessity of closure.

The Globe filed a petition for extraordinary relief with a single justice of the Supreme Judicial Court for the County of Suffolk, challenging the constitutionality of the trial judge's closure order entered pursuant to M.G.L. c. Sec. 16A. The justice denied the petition, thereby allowing the rape trial of Defendant Aladjem to proceed with the press and public excluded.

The Globe appealed this ruling to the Supreme Judicial Court for the Commonwealth of

Massachusetts. Globe Newspaper Co. v. Superior Court, 401 N.E.2d 360 (Mass. 1980) (Globe I). The court, declining to address specifically the constitutional issues raised by the Globe, ruled on the basis of statutory construction that Sec. 16A required exclusion of the press and public from trials of sex-related crimes while the minor victims of these crimes were testifying. The court also ruled that the trial judge has discretion to exclude the press and the public from the remaining portions of the trial if exclusion was "necessary *** to preserve evidence required for a just conviction." 401 N.E.2d at 372.

The Globe appealed to this Court, which vacated the Supreme Judicial Court's judgment and remanded the case for further consideration in light of Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980). Globe Newspapers Co. v. Superior Court, 101 S.Ct.295 (1980). On remand, the Supreme Judicial Court held that the mandatory closure of criminal trials of sex-related crimes during the minor-victim's testimony did not violate the Globe's First Amendment rights as those rights were articulated in Richmond Newspapers. Globe Newspaper Co. v. Superior Court, 423 N.E.2d 773 (Mass. 1981) (Globe II). The Globe is now appealing to this Court to reverse this ruling.

ARGUMENT

I. INTRODUCTION

Once again, this Court has agreed to consider whether, and under what circumstances, the press and the public may be excluded from judicial proceedings.

Yet quite unlike the previous cases before this Court involving trial or pretrial closures, this case involves a state legislative mandate that specific portions of all trials of certain enumerated sexual crimes automatically be closed to the public. The trial court is not granted discretion to determine how the state's interests can best be served without infringing upon the established constitutional rights of the parties to the proceeding, the public and the press. The state's mandate contemplates no notice to the press and public and no hearing prior to closure of the courtroom. Whether or not justice can be fairly administered in a particular trial, with the courtroom open to the press and public, is irrelevant. The state has already determined, in blanket and all-encompassing fashion, that at least portions of all criminal trials involving sex-related crimes must be closed. All of these factors make clear

that the state, in this case, has ignored its obligation to maintain trials as open and public processes.

Amicus respectfully submits that this system of mandatory exclusion of the press and the public from portions of criminal trials cannot survive scrutiny under the substantive and procedural mandates of the First and Sixth Amendments and the principles this Court recently set forth in Richmond Newspapers Inc. v. Virginia, supra.*/

II. THE FIRST AMENDMENT RIGHT TO ATTEND CRIMINAL TRIALS PROHIBITS AUTOMATIC CLOSURE OF TRIALS INVOLVING SEX-RELATED CRIMES, IN WHOLE OR IN PART, AND NO CLOSURE IS PERMITTED UNLESS IT IS STRICTLY AND INESCAPABLY NECESSARY TO AVOID AN EGREGIOUS MISCARRIAGE OF JUSTICE.

This Court recently announced in Richmond Newspapers Inc. v. Virginia, supra, that the press and the public have a guaranteed right of

---

*/ Attorneys for Amicus were assisted in preparation of this brief by law students Kathy Shwiff of the University of Texas Law School and Gary Thornton of Pepperdine University Law School.

access, under the First Amendment, to attend criminal trials. The Court found that "without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'" 448 U.S. at 580, quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972). This Court is now asked to elaborate further upon this ruling by determining whether, and under what circumstances, a state may require automatic exclusion of the press and the public from portions of all trials of sex-related crimes even over the opposition of the defendant.

The mandate of Richmond Newspapers is clear -- the trial of all criminal cases must be open to the public absent "an overriding interest articulated in findings." 448 U.S. at 581. The plurality opinion and the several concurring opinions differed somewhat in their discussion of standards for closure. Yet two unifying themes surfaced. That is, any state's attempt to close trials must be critically analyzed in the light of the asserted state interest in closure.

Secondly, the court closure must be narrowly focused toward achieving the governm-ntal interest at stake so as to minimize infringement

of the First Amendment rights of those seeking access to the trial. 448 U.S. at 581, 600-601.1/

The first task before the Court, therefore, is to clarify whether any interest is sufficiently crucial to the state to justify automatic closure of a criminal trial involving a sex-related crime during the victim witness' testimony. Amicus suggests that trial courts should only consider closure in this situation if the state is able to demonstrate that closure is strictly and inescapably necessary in the particular situation to avoid an egregious miscarriage of justice. In other words, the burden is on the state to prove that, without closure during each victim witness' testimony, it

---

1/ Even before Richmond Newspapers, this Court had firmly established that "[b]road prophylactic rules in the area of free expression are suspect *** . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." NAACP v. Button, 371 U.S. 415, 438 (1963). In this sense, the Court's opinion in Richmond Newspapers is applying traditional First Amendment analysis. See, e.g., Linmark Associates Inc. v. Willingboro, 431 U.S. 851, 895-896 (1977); Gooding v. Wilson, 405 U.S. 518, 521-522 (1972); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 463-464 (1958).

will be unable to proceed with its case against the defendant.2/

This standard represents an appropriate application of the Richmond Newspapers mandate to this category of cases because it recognizes the preeminent role played by the First Amendment in assuring freedom of communication on important matters relating to the functioning of government. 448 U.S. at 575. The Court can only ensure this preeminent role of the First Amendment by prohibiting states from arbitrarily foreclosing access to trials. Id. at 576-577. As described by the plurality in Richmond Newspapers: "[I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted *** ". Id. at 575. This assertion is especially true in the context of criminal trials involving violent crimes, such as sex crimes, in which the public

---

2/ Amicus need not elaborate upon other state interests, such as the desire to avoid distraction in the courtroom, overcrowding and other mechanical interests that are irrelevant in the context of this case. See, e.g., Richmond Newspapers, supra. at 600 (Stewart, J., concurring).

is highly concerned that justice be carried out in an effective, efficient, fair and even-handed manner. See, generally, H. Weihofen, The Urge to Punish (1956). With this recognition in mind, the Court should leave no outlet for Massachusetts to rely upon insupportable, or even weak and invalid assumptions in asserting its purported interests in closing trials of sex-related crimes.

Applying this standard to the Massachusetts statute, Sec. 16A, it is evident that, both on its face and as construed by the Supreme Judicial Court, the statute must be declared void. Massachusetts has attempted to carve out a blanket exception to the inherent First Amendment presumption of open trials by declaring that all trials involving sex crimes should be closed to the public while a minor victim of such crime is testifying. Although the Massachusetts statute allows those with a "direct interest" to enter the courtroom after the court files its closure order, this standard is both too restrictive and too vague to withstand constitutional scrutiny. There is no legitimate basis to distinguish between friends of the defendant, friends who may well be newspaper reporters, for example, who are included within this standard, see, Commonwealth v. Marshall, 356 Mass. 432, 253 N.E.2d 333

(1969), and other members of the public and the press. See CBS Inc. v. Young, 522 F.2d 234 (6th Cir. 1975). But even more fundamentally, the state's interests identified by the Supreme Judicial Court are insufficient to require closure of all testimony of all victims during all trials encompassed by Sec. 16A of this statute.

Even a cursory examination of the various state interests identified by the Supreme Judicial Court in Globe I and Globe II reveals that these interests are based upon mere speculation as well as a series of unsupported and insupportable assumptions.

For example, the state has decided to require closure of trials during a minor's testimony in order "to encourage minor victims to come forward to institute complaints and give testimony." Globe I, 401 N.E.2d at 360. The state has failed to provide any factual basis to demonstrate how court closures will serve to encourage minors to come forward. On the contrary, it seems somewhat illogical that secrecy and lack of public knowledge of a rape victim's testimony would encourage other victims to come forward. It is more likely that whatever anxiety and psychological distress these victims have suffered since the crime could, in fact, be alleviated by a greater certainty that they will

be treated sensitively throughout the judicial process. If that process becomes more secretive than it is now, it is doubtful that future rape victims will be more at ease in coming forward. Even the Supreme Judicial Court in Globe I recognized the speculative nature of this interest in reasoning that the possibility of testifying in public "might" lead a young victim to choose not to cooperate with the prosecution and that her knowledge that some of the people in the courtroom were "reporters who might publish her testimony *** would probably increase *** her sense of exposure." Globe I, 401 N.E.2d at 371 (emphasis added throughout).

Furthermore, this asserted state interest could well be at odds with the interests of some victims who would actually prefer to testify in open court. Some victims may seek a more public forum to vindicate their position. That is, they may prefer to let the public see and hear their testimony to allay any doubts that the public may have about their credibility. They may also want to testify publicly to bring retribution upon the defendant. And finally, by requiring victims to testify in public, with the resulting publicity, the state may encourage other witnesses who otherwise might not even be aware of the nature or details of the victim's side of the story to come forward and support the

victim's testimony. See In re Oliver, 333 U.S. 257, 270 n. 24 (1948).

An additional state interest underlying Sec. 16A identified in Globe I is to protect minor victims from public degradation, humiliation, demoralization and psychological damage. 401 N.E.2d at 360. Amicus would never dispute that some minor victims of sex crimes are likely to be degraded, humiliated and otherwise psychologically damaged from the assault. Nor would Amicus dispute the state's sensitivity in wishing to protect minors from additional significant psychological or emotional harm from testifying. We do dispute, however, the state's unwarranted claim that it will be able to provide minors with any significant additional protection by closing their testimony to the public. The fact is, quite simply, that this victim will already be facing a courtroom filled with strange faces.3/ It is simply unproven that

---

3/ In addition to the various court personnel who must be present --the judge, marshals, court reporters, jurors, attorneys and the defendant-- the Supreme Judicial Court of Massachusetts has construed the "direct interest" standard of Sec. 16A to allow the defendant's father, mother, brother, sister and friends to attend the trial. See, Commonwealth v. Marshall, 356 Mass. 432, 253 N.E.2d 333 (1969).

the addition of a few more strange faces belonging to members of the public or the press is likely to result in greater psychological damage to the victim than will occur with the press and general public absent.

The related state interest described in Globe II as the goal of enhancing "the likelihood of credible testimony from such minors, free of confusion, fright or embellishment,"423 N.E.2d at 779, is equally speculative. Again, it is unlikely that the addition of a few anonymous members of the press or public would have any measurable impact on the witness, either in terms of her psychological state or her ability to testify. Further, the record in this very case refutes the validity of this state interest. The victims here did not object to the presence of the press in the courtroom. Their particular concerns with the press focused upon avoiding publication of personally identifying material.4/ They never indicated that they would have been unable to give credible testimony if the press were allowed to remain in the courtroom. The presumption is to the contrary.

4/ App. 22a to Appellant's Jurisdictional Statement.

And finally, even assuming that the state's concern about threats to the credibility of testimony has some legitimate basis, this threat is not one that can be ameliorated by the blanket closure of trials, or portions thereof, mandated by Sec. 16A. Most witnesses, whether juveniles or adults, feel some level of apprehension about testifying in court, especially if they are unfamiliar with the trial process. While this apprehension may, at times, affect the witness' ability to testify, a blanket closure of the courtroom is not an appropriate solution. Indeed, if the state adopted a standard based upon mere apprehension and embarrassment to justify court closures, no trials would ever be open to the public.

The state also seeks to justify its authority to exclude the press and the public from criminal trials during the victim's testimony by claiming its interest in the "sound and orderly administration of justice" and in obtaining "just convictions." It is ironic indeed that these state interests, legitimate as they may be for other purposes, would be cited by the state to justify closing the courtroom to the public and the press. Perhaps the most important and recurring theme underlying this Court's recent treatment of court closure issues is the goal of maintaining a fair and impartial

judicial process by opening it to public inspection. Richmond Newspapers, supra, 448 U.S. at 568-569; Gannett v. DePasquale, 443 U.S. 368 at 384, 386 n.15, 418-425 (1979). It is also perplexing that Massachusetts would find that its interests in the orderly administration of justice could only be furthered by a blanket mandate to close specific portions of trials, while none of the forty-nine other states has felt compelled to achieve these interests with such a drastic, across-the-board approach.

This series of speculative and unsupported interests asserted by the state to justify a blanket closure of sex-related criminal trials during the victim's testimony falls far short of the "overriding" interest necessary to overcome the heavy presumption favoring press and public access to the courtroom as described in Richmond Newspapers.

This Court should impose a much greater burden on a state seeking to limit the public's and the press' exercise of their First Amendment rights. See, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); NAACP v. Alabama ex rel. Flowers, 377 U.S. 288 (1964). For this reason, Amicus urges this Court to adopt a narrowly drawn standard for analyzing a state's asserted interest in closing courtrooms during trials of

sex-related crimes. Thus, in the context of this case, the Court should first make clear that no automatic, blanket closure, without regard to the facts and the interests at stake in each individual case, will withstand constitutional attack. Next, assuming that the defendant has waived his Sixth Amendment rights, the state should be required to demonstrate convincingly that a closure of the trial during the victim witness' testimony is strictly and inescapably necessary to avoid an egregious miscarriage of justice. In other words, the state must show that, without closure, it will be unable to carry forward its case against the defendant and that a miscarriage of justice will result.

We respectfully submit that the Massachusetts statute on its face and as construed by the Supreme Judicial Court must be declared void. The state has not, and indeed could never, demonstrate that its infringement of the press and public's First Amendment right of access to criminal trials by closing all testimony of all victims during every trial of crimes involving sex is necessary to avoid an egregious miscarriage of justice.

III. PRIOR TO CLOSURE OF ANY CRIMINAL TRIAL OR PORTIONS THEREOF, THERE MUST BE NOTICE AND A HEARING TO ASSESS THE STATE'S ASSERTED INTERESTS IN AVOIDING AN EGREGIOUS MISCARRIAGE OF JUSTICE AND TO ENSURE THAT CLOSURE IS THE LEAST DRASTIC MEANS AVAILABLE TO ACHIEVE THIS INTEREST.

As this Court well knows, no otherwise legitimate state action can withstand First Amendment scrutiny if it could be revised so as to exert less restraint on protected freedoms while still achieving its purpose. In other words, if a less restrictive alternative is available, the state action is overbroad. NAACP v. Alabama ex rel. Flowers, supra, 377 U.S. at 307; Shelton v. Tucker, 364 U.S. 479, 488 (1960).

This basic constitutional doctrine of overbreadth, in conjunction with general due process considerations, demand that courts provide notice and a hearing prior to closing trials or portions of trials to the public and the press. This Court's cases make clear that even preliminary, nonfinal decisions which merely threaten First Amendment rights must afford those so threatened with notice and an opportunity to be heard. See, e.g., Smith v. Organization of Foster Families, 431 U.S. 816

(1977); Carroll v. President and Commissioners of Princess Ann, 393 U.S. 175 (1968); Freedman v. Maryland, 380 U.S. 51 (1965); see also McKay, The Preference for Freedom, 34 N.Y.U. L. Rev. 1182, 1219 (1959). Only by conducting case-by-case hearings will courts be able to weigh adequately, on the one hand, the state's asserted interests in closing the trial of a sex-related crime with the press and public's First Amendment rights of access to this same trial.

The Massachusetts statute, Sec. 16A, as construed by the Supreme Judicial Court, forecloses any opportunity for a case-by-case inquiry during the testimony of minor victims in trials involving sex crimes. The judge in these trials need not --indeed, cannot-- consider the particular characteristics of the minor victim or her ability to testify. Instead, the state legislature has supplanted such individualized determinations with general, across-the-board findings about the necessity of closure during these trials. See, Globe II, 423 N.E. 2d at 782 (Wilkins, J., concurring).

The Supreme Judicial Court in Globe II refused to accept The Boston Globe's assertion that a balancing of state interests against First Amendment rights is permissible only if

undertaken on a case-by-case basis. 423 N.E.2d at 779. 5/ The court insisted that Richmond Newspapers requires no such holding. Id. 6/ Yet there is explicit language in Richmond Newspapers to the contrary. According to the plurality: "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." 448 U.S. at 581 (emphasis added). Even more explicitly, the plurality spoke in terms of a trial judge's findings in particular cases to justify reasonable limitations on access to a trial:

> "[T]he question in a particular case is whether that control is exerted so as not to deny or

---

5/ Justice Wilkins, concurring in Globe II, disagreed with the court's refusal to require a case-by-case determination of closure orders: "I am not certain that the mandatory closure of the trial of a case involving a minor victim of a sex crime during his or her testimony, as the court directs, is constitutionally permissible without specific findings by the judge that the closing is justified by overriding or countervailing interests of the Commonwealth." 423 N.E.2d at 782 (emphasis added).

6/ Virtually every court that has addressed this issue since Richmond Newspapers has found, contrary to the reading of the Massachusetts court, that a hearing is required. See, e.g., State v. Green, 395 So.2d 532 (Fla. 1981); Patuxent Publishing Corp. v. State, 48 Md. App. 689, 429 A.2d 554 (1981); State v. Sinclair, 274 S.E.2d 411 (S.C. 1981); Herald Ass'n, Inc. v. Ellison, 138 Vt. 529, 419 A.2d 323 (1980).

> unwarrantedly abridge *** the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places." [448 U.S. at 581-582 n. 18.] (emphasis added).

Further, the plurality in Richmond Newspapers specifically identified the "lack of findings to support closure" as one of several grounds for reversal of the trial judge's decision to close the courtroom. Id. at 580.

It is clear by this language in Richmond Newspapers as well as the constitutional mandate to ascertain the least drastic means of achieving the state's asserted interests in avoiding a miscarriage of justice that courts must provide a hearing before seeking to exclude the public and the press from criminal trials, in whole or in part.

In urging a hearing prior to closure, Amicus does not believe that such hearing need be as burdensome to the trial court as envisioned by the Supreme Judicial Court in

Globe II, 423 N.E.2d at 777-780. 7/ Regardless of the nature of the hearing, its basic function should be to ensure that the trial judge makes appropriate findings as to the overriding interests of the state in avoiding an egregious miscarriage of justice prior to the exclusion of the press and the public. Those members of the press or the public whom the state seeks to exclude from the courtroom should have a meaningful opportunity to present their views to the court. The burden should be heavily upon the state to demonstrate that closure during the victim witness' testimony is strictly and inescapably necessary to avoid an egregious miscarriage of justice. The trial court should restrict its inquiry to the most narrow portion of the victim witness' testimony, --for example,

---

7/ Even if a hearing would prove somewhat burdensome to the trial courts, this does not mean that courts should be allowed to ignore the constitutional rights of the press and the public by not holding a hearing on the closure issue. Just as trial courts must hold hearings to determine the competency of defendants to stand trial in order to protect their Sixth Amendment rights, so too must a hearing be held to protect the press and the public's First Amendment rights.

her description of the assault-- as is necessary to avoid this miscarriage of justice. And, finally, the court should review any available alternatives to closure to assess whether closure is truly the least drastic means available to achieve the state's overriding interests. The Massachusetts statute challenged here is unconstitutional on its face and as construed by the Supreme Judicial Court because it forecloses any such individualized determinations by the trial judge on the necessity of closure.

IV. THE SIXTH AMENDMENT RIGHT TO A PUBLIC TRIAL PROHIBITS AUTOMATIC CLOSURE OF SUCH TRIALS.

In addition to the First Amendment right of access to the courtroom as declared in Richmond Newspapers, the public and the defendant have an independent Sixth Amendment right to open trials. The Sixth Amendment provision that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial" demands that a criminal trial remain open unless closure is inescapably necessary to safeguard an overriding state interest, unless there are no less drastic means available to protect that

interest, and unless the trial court makes the appropriate findings that closure is essential to protect those interests. See Gannett Co. v. DePasquale, supra, 443 U.S. at 441-42 (1979) (Blackmun, J., concurring in part and dissenting in part); see generally Nebraska Press Ass'n v. Stuart, supra.

Amicus believes, contrary to the ruling of the Supreme Judicial Court in Globe II, 423 N.E.2d at 775-776, that The Globe Newspaper Company does have standing to assert its own Sixth Amendment rights as well as the Sixth Amendment rights of the defendant, Albert Aladjem. The general rule that only the interested party can assert his or her own constitutional rights is a "rule of self restraint" which courts have relaxed when "outweighed by the need to protect fundamental rights." Barrows v. Jackson, 346 U.S. 249 (1953). For example, when there is a close relationship between the constitutional rights of the litigant and those of the third party, courts have relaxed this rule. See Craig v. Boren, 429 U.S. 190 (1976); Eisenstadt v. Baird, 405 U.S. 438 (1972). Similarly, if the enjoyment of the constitutional right by the third party "is inextricably bound up with the activity the litigant wishes to pursue," the court should allow the litigant to assert those rights. Singleton v. Wulff, 428 U.S. 106, 114-115 (1975).

If any case justifies relaxing the rule against prohibiting third-party standing, this is that case. The appellants and the defendant have an identity of constitutional rights and both parties have exercised those rights to challenge the state's closure of this trial. The enjoyment of the defendant's Sixth Amendment right to a public trial "is inextricably bound up" with the Globe Newspaper Company's interests in ensuring that trials remain open to the press and the public. Because the defendant was acquitted of the criminal charges, he has no reasonable means or incentive to pursue his Sixth Amendment rights other than through the Appellants in this action.

Having established the Globe's standing to assert the constitutional rights of the defendant, Amicus submits that those rights have been infringed by court closure in this case, even though the defendant has been acquitted.

A defendant's Sixth Amendment rights do not disintegrate with the termination of his trial. The stigma of having been charged with a serious criminal offense will haunt the defendant long after acquittal. His only true chance for vindication rests with the public's ability to judge for itself the veracity of his accuser's testimony and the adequacy of his own defense.

Testimony delivered behind closed doors will only fuel the public's suspicion that the defendant was released for reasons other than actual innocence. See 3 Blackstone, Commentaries 373.

In addition to the defendant's rights to a public trial that endure beyond the trial itself, the press and the public have an independent Sixth Amendment right to public trials. The Court's recent holding in Gannett v. DePasquale, supra, does not foreclose this conclusion. Unlike the present case involving a trial in which the defendant objected to closure, Gannett involved a pretrial proceeding in which the defendant asked the judge to close the courtroom to the press and public.

Just as this Court has found the public's and the press' First Amendment right of access to the courtroom firmly embedded in historical evidence, Richmond Newspapers, supra at 564-569, so too should this Court recognize the historical roots of the public's Sixth Amendment right to open trials.

The public trial provision of the United States Constitution has generally been viewed as an outgrowth of the common law practice that "the trial is always public." 3 J. Story,

Commentaries on the Constitution of the United States (unabr. rep. 1970) (1st ed. Boston 1883). American colonists viewed the right of the public to attend all judicial proceedings as an essential guarantee as evidenced by the fact that public trial provisions were contained in several state charters. See 1 B. Schwartz, The Bill of Rights: A Documentary History 125 (1971). No evidence suggests that the drafters of the Sixth Amendment intended to secure for the people any less extensive a right than that conceived by the drafters of the state charters or accorded by common law. Note, The Rights to a Public Trial in Criminal Cases, 41 N.Y.U. L. Rev. 1138 (1966).

The methods used by the public to gain insight into the judicial process have changed drastically in recent history. This Court described this transformation in Richmond Newspapers:

> Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates

> for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute(s) to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system *** ." Nebraska Press Ass'n v.Stuart, 427 U.S. 539, 587 (Brennan, J., concurring). [448 U.S. at 572-573. See generally, Alfred Friendly and Ronald L. Goldfarb, Crime and Publicity: The Impact of News on the Administration of Justice (New York: The Twentieth Century Fund, 1967).]

Although the methods of acquiring information about trials have changed, the value of maintaining trials as open and public processes is just as imperative as ever. Open trials continue to have a "significant community therapeutic value." Richmond Newspapers, 448 U.S. at 571. The process of "community catharsis" will be thwarted if justice is "done in a corner [or] in any covert manner." Id.

When viewing the history of open trials and this history's apparent influence upon the drafters of the Sixth Amendment, as well as the

continued importance of open trials to the public as recognized by this Court, it becomes obvious that the Sixth Amendment guarantee of a public trial belongs to the public as well as the accused.

CONCLUSION

Massachusetts General Laws c. 278 Sec. 16A, as construed by the Supreme Judicial Court, requires exclusion of the press and the public from portions of all trials of certain crimes even over the opposition of the defendant. The state has failed to demonstrate that under the particular facts of this case, closure is strictly and inescapably necessary to safeguard its overriding interest in avoiding an egregious miscarriage of justice. On the contrary, this statute specifically precludes a trial court from making case-by-case findings to establish that closure is necessary to protect this interest and that closure is the least drastic means available to do so. For these reasons, this Court should declare Sec. 16A void in

violation of the First Amendment right to attend criminal trials as well as the Sixth Amendment rights of the public and the accused to a public trial.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.
Hogan & Hartson
815 Connecticut Avenue N.W.
Washington, D.C. 20006
Attorney for Amicus Curiae

Of Counsel:

Jack C. Landau
Judy D. Lynch
Clemens P. Work
The Reporters Committee for
Freedom of the Press
1125 15th Street N.W.
Washington, D.C. 20005